United States Court of Appeals for the Second Circuit



APPELLANT'S BRIEF & APPENDIX

75-1069

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

-against- : 73 Cr. 1042

ISABELIO RIOS,

Defendant-Appellant :

and appendix
BRIEF/FOR THE DEFENDANT-APPELLANT



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ISSUES TO BE PRESENTED

- 1. WERE THE APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE DUE PROCESS CLAUSE VIOLATED BECAUSE ENGLISH-SPEAKING PSYCHIATRISTS WERE UTILIZED TO EXAMINE A SPANISH-SPEAKING INDIGENT DEFENDANT AS TO HIS COMPETENCY TO STAND TRIAL AND AS TO HIS CRIMINAL RESPONSIBILITY?
- 2. WAS THE ADMISSION OF HEARSAY TESTIMONY BY PSYCHIATRISTS, WHO DID NOT CONDUCT A THOROUGH AND PROPER EXAMINATION, ON THE ISSUE OF THE CRIMINAL RESPONSIBILITY AND COMPETENCY OF THE APPELLANT, SO PREJUDICIAL AS TO EFFECTIVELY DENY THE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL?
- 3. WAS JUDGE PLATT'S DETERMINATION, AFTER A COMPETENCY HEARING, THAT THE APPELLANT WAS COMPETENT TO STAND TRIAL CLEARLY ERRONEOUS BECAUSE IT WAS BASED ON THE TESTIMONY OF PSYCHIATRISTS WHO HAD FAILED TO CONDUCT PROPER EXAMINATIONS, WERE NOT QUALIFIED PURSUANT TO THE PROVISIONS OF TITLE 18 U.S.C.A. §4244, AND BECAUSE THE JUDGE RENDERED HIS OPINION BASED ON THE ASSUMPTION THAT THE GOVERNMENT WOULD DISMISS THE CONSPIRACY COUNT OF THE INDICTMENT?
- 4. WAS THE MOTION BY DEFENSE COUNSEL FOR A JUDGEMENT OF ACQUITTAL IMPROPERLY DENIED BECAUSE OF THE FACT THAT A JURY COULD NOT HAVE BUT FOUND THAT A REASONABLE DOUBT EXISTED WITH REGARD TO THE ISSUE OF THE APPELLANT'S SANITY AND CRIMINAL RESPONSIBILITY AND BECAUSE THE GOVERNMENT HAD NOT PROVEN THE APPELLANT LEGALLY SANE BEYOND A REASONABLE DOUBT AND, THEREFORE, THE CASE SHOULD NOT HAVE BEEN PRESENTED TO THE JURY?

NOTE TO THE COURT

The minutes of the Competency Hearing have not been numbered consecutively. The part of the hearing that was conducted on November 22, 1974 includes the testimony of Harry Stevens and Dr. Schwartz (pages 1-78). The part of the Competency Hearing that was conducted on November 25, 1974 includes the testimony of Dr. Chaitin (pages 1-49). The part of the Hearing that was conducted on December 2, 1974 includes the testimony of Dr. Fleetwood and the decision of Judge Platt (pages 1-61). These numbers are referred to in Appellant's brief. Attorney for Appellant respectfully apologizes in advance for any inconvenience this numbering system may cause.

PRELIMINARY STATEMENT

Isabelio Rios appeals from a judgment of conviction entered on December 10, 1974, in the United States District Court for the Eastern District of New York after a four-day trial before the Honorable Orrin G. Judd, United States District Judge, and a jury.

Indictment 73 Cr. 1042, filed on December 6, 1973, charged defendant with possession with intent to sell heroin (Count I), possession with intent to sell cocaine (Count II), and conspiracy to possess heroin with intent to sell (Count III), in violation of Title 21, United States Code sections 841 (a)(1) and 846, respectively.

A pre-trial hearing was held before the Honorable Judge Platt on November 22, November 25, and December 2, 1974, to determine defendant's competency to stand trial. After conflicting testimony from three psychiatrists, Judge Platt ruled that the defendant was fit to proceed, on the basis that the government would withdraw the conspiracy count (Count III), which they did (see Competency Hearing minutes, 12/2/74, pp. 60-61).

Defendant's trial commenced on December 4, 1974 and concluded on December 10, 1974 when the jury found defendant guilty on Count I and not guilty on Count II.

On February 7, 1973, Judge Judd sentenced Isabelio Rios to six years imprisonment plus a five-year special parole and a fine of \$7,000.

STATEMENT OF FACTS

A. The Competency Hearing (11/22/74)

HARRY STEVENS was the medical technical assistant at the Federal House of Detention on West Street while defendant, Isabelio Rios, was imprisoned there prior to trial (C-9, 10). (The symbol "C" followed by a page number refers to the minutes of the Competency Hearing.) HARRY STEVENS' duties include performing preliminary physical examinations of inmates, and receiving their medical complaints (C-10). He testified that defendant received doses of methadone over a one-week period commencing November 30, 1973 for treatment of heroin addiction (C-17, 18, 19). Defendant's medical records revealed that there was a complaint of vomiting on December 2, 1973, and shortness of breath and chest pains on December 8, 1973. MR. STEVENS characterized these complaints as secondary symptoms of withdrawal from heroin (C-18, 19, 21). Defendant also registered complaints for constipation on June 4, June 7, and June 11, 1974 (C-21, 22).

DR. DANIEL W. SCHWARTZ, director of the Forensic

Psychiatry Service at Kings County Hospital (C-36) was qualified
by the government to give an expert opinion on competency (C-39).

For the purpose of determining the competency of Isabelio Rios,

DR. SCHWARTZ examined the defendant for about 45 minutes on

March 13, 1974 at Kings County Hospital. An alleged unidentified

interpreter was utilized during said examination to communicate

between defendant, whose native tongue is Spanish and DR.

SCHWARTZ (C-39, 40). DR. SCHWARTZ testified that defendant did not seem depressed or withdrawn and responded coherently to questions asked during the examination (C-44). DR. SCHWARTZ used a copy of the indictment during the interrogation to determine if defendant was aware of the then pending legal proceedings (C-41, 43, 44). Defendant admitted knowing that possession of narcotics was illegal, but he also said, "I knew it, but when you feel sick the way I have, then you're blind to everything else." (C-44). DR. SCHWARTZ wrote a report based on the examination (government exhibit #2), and concluded that defendant was aware of the nature of the charges against him, and was able to assist defense counsel (C-46, 47).

On cross-examination by defense counsel, DR. SCHWARTZ admitted that he did not include anything about the scars on defendant's body in the report because he only learned about the scars from a nurse's notes (C-55, 56). During the competency examination, defendant told DR. SCHWARTZ that he was arrested on November 29, 1973. However, DR. SCHWARTZ did not know whether defendant was referring to the state arrest or federal arrest, both of which occurred on that day (C-71). DR. SCHWARTZ admitted that he could not determine defendant's mental state at the time of the allegations in the indictment (C-63). DR. SCHWARTZ admitted that he could not speak or understand the Spanish language.

DR. RAYMOND CHAITIN, who testified on November 25, 1974, is a physician specializing in psychiatry, employed by Kings County Hospital, and was qualified by the government as an expert on the issue of competency (C-8, 9, 10). DR. CHAITIN conducted a "verbal and non-verbal examination" of Isabelio Rios for about an hour at Kings County Hospital on October 9, 1974. For the purpose of understanding the defendant, the priest of the inmates at the Federal House of Detention, Reverand Nieves was utilized as an interpreter by DR. CHAITIN during said examination (C-10, 11, 12, 14). DR. CHAITIN used the federal indictment at this examination, and determined that defendant understood that possession of heroin was against the law (C-13, 14). DR. CHAITIN concluded that the defendant was competent based on the defendant's responses through the interpreter, defendant's facial expressions, lack of delusional thinking, and ability to recall past experiences (C-15, 16). DR. CHAITIN admitted that the electroencephalogram (EEG), ordered by Judge Platt for the defendant at defense counsel's request (see Judge Platt's Order Appendix K) had not been administered (C-21, 22).

On cross-examination, DR. CHAITIN revealed that defendant was not advised that a confidential relationship may arise from communications with a priest, nor was he aware that said relationship was being violated at the time of the examination. Furthermore, DR. CHAITIN had "no way of knowing" whether or not the defendant felt open in the presence of the

priest (C-30). He also admitted finding no evidence of or having knowledge of defendant's attempts, signs of said attempts and/or defendant's lack of sleep problem until reading DR. FLEETWOOD's report of her examination. DR. CHAITIN admitted that he could not speak or understand the Spanish language.

DR. MARIA FREILE FLEETWOOD, who testified on December 2, 1974, is an assistant professor of psychiatry at New York Hospital and qualified as an expert for this hearing (C-4, 8). DR. FLEETWOOD is multi-lingual and speaks French, Italian, Spanish, and English. She conversed freely with the defendant in his native tongue of Spanish. DR. FLEETWOOD examined the defendant on October 8, 1974, at which time she discovered that the defendant attempted suicide on a number of occasions, evidenced by scars on his face and body (C-6, 12, 13). DR. FLEETWOOD found that Isabelio Rios suffered from hallucinations, had difficulty remembering dates, and contradicted himself often. DR. FLEETWOOD testified that the defendant was "completely controlled by his anxiety and his depression" (C-15, 16).

DR. FLEETWOOD wrote a report (defendant's exhibit E) which revealed that the defendant could not remember the years in which his children were born (C-19). Defendant's statements that he expected to be released from prison, and hoped to go back to Puerto Rico supported DR. FLEETWOOD's determination that the defendant did not understand the nature of the legal proceedings against him (C-23, 24).

DR. FLEETWOOD spent 1 1/2 hours examining Isabelio Rios, and never medically examined anyone through an interpreter in regard to psychiatric questions (C-26, 24). This doctor testified that using a priest as an interpreter might prevent a patient from revealing sins, especially suicide attempts (C-26). During her examination of the defendant, he was confused, scattered, and his associations were loose (C-27, 28). DR. FLEETWOOD concluded that Isabelio Rios was not competent and diagnosed him as a schizophrenic of the chronic type (C-30, 31, 32, 37, 49).

On cross-examination, DR. FLEETWOOD testified that the defendant probably would not be able to enter a business deal or negotiate the sale of property (C-50), and that "if left alone, the patient is not in contact with reality" (C-53). On redirect, DR. FLEETWOOD testified that Isabelio Rios would have difficulty assisting counsel because he could not communicate in a logical way. (C-57, 58).

B. The Trial

1. The Prosecution's Case

CRUZ CORDERO is a spanish-speaking, undercover narcotics agent for the Drug Enforcement Administration (T-20, 21) (The Symbol "T" followed by a page number refers to the trial transcript). At approximately 5 p.m., November 26, 1973, CORDERO and the alleged paid confidential informant, Bobby Rodriguez who never testified or was produced by the government at trial, knocked on the door of apartment no. 4 at 16 Mauser Street in Brooklyn. Isabelio Rios let them in, and Rodriguez introduced Rios to CORDERO (T-24, 25, 26). CORDERO then asked the defendant if there was heroin for sale, and prices and quantities were discussed (T-27). Rios told them to return on November 28 (T-29). CORDERO and paid informant Rodriguez did return at the appointed time (T-30, 31). No sale occurred, but Rios gave CORDERO a small sample of heroin, and told them to return the next day (T-32, 34). CORDERO returned to the apartment with special agent John Rodriguez (T-39). Defendant was reluctant to open the door, being suspicious that CORDERO was a policeman. CORDERO, however, insisted he was interested in buying heroin (T-39). Rios opened the door and nine "surveilling officers" entered and conducted a search (T-40). On cross-examination, CORDERO testified that Rios did not take any money or sell any heroin (T-102).

ROBERT MARSH, special agent with the Drug Enforcement

Administration, drove Cordero and Rodriguez to 16 Mauser Street
on November 26 and 28 (T-111, 112, 113, 114, 115). MARSH
testified that a test of the sample attained on November 28
proved positive for heroin (T-117). On November 29, MARSH
returned to the vicinity of 16 Mauser Street with a search warrant
and a group of surveilling agents (T-118). MARSH positioned
himself in the stairwell, and observed Cordero and John
Rodriguez talk to the defendant. When the door was opened, MARSH
and the other agents entered the apartment and "secured the
area" (T-120).

MARSH then placed defendant under arrest, advised him of his rights, and supervised a search of the apartment, pursuant to a search warrant. Two other males, a female, and a child were also in the apartment (T-121, 122). The search uncovered various items (T-122, 125, 152, 153, 154, 155), lactose (T-156), \$6,528 in cash (T-161, 162), and various narcotics paraphernalia (T-164 through 171). MARSH testified that the informant Bobby Rodriguez, could not be located after diligent efforts (T-174, 175, 176). Rodriguez had a criminal record, and earned approximately \$1,450 as an informant (T-178, 263, 264).

STANLEY BLASOF is a Forensic chemist who administered chemical tests on the substances found in apartment no. 4 at 16 Mauser Street. The analysis of the sample that the defendant alleged to have given to undercover agent Cordero on November 28,

1973, revealed that it weighed 70 milligrams, containing 37.9% heroin (government exhibit no. 1) (T-235,236). The contents of government exhibit no. 2 was found to weigh 27.21 grams of which 36% was heroin (T-237). The contents of government exhibit no. 3 was found to weigh .55 grams of which 72% was cocaine (T-238, 239). Government exhibit no. 7 weighed .71 grams of which 14% was cocaine (T-242, 243). MR. BLASOF also found 3.46 grams of quinine (government exhibit no. 5), 44.39 grams of lactose (government exhibit no. 6), and 303 grams of lactose (government exhibit no. 6), and quinine are known as "cutting agents" for heroin (T-238 through 244).

MARYANN MESSINA is a New York City policewoman who works as an undercover narcotics agent (T-269, 270). MS.

MESSINA was permitted to testify for the government under the prior similar acts doctrine (T-264, 265, 266). On November 20, 1973, MESSINA and the same paid confidential informant, Bobby Rodriguez, knocked on the door and entered apartment no. 4 at 16 Mauser Street in Brooklyn (T-270 through 273). On this occasion, MS. MESSINA testified that she paid defendant \$90.00 for some packets (T-278). On November 21, 1973 MESSINA and Rodriguez, the same paid confidential informant, returned to the same apartment (T-279, 280). On this occasion, MESSINA received some packets from a man named Pancho (who was Ayala Diaz, an indicted co-conspirator whose federal indictment was dismissed and whose state indictment resulted in a conviction) (T-295) (See Appendix), and then handed defendant \$100.00 (T-280, 281,

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282). A stipulation between the defense counsel and the prosecutor was agreed upon which stated that the aforementioned packets did contain some heroin (T-289, 290).

On cross-examination, officer MESSINA testified that she only worked on approximately five cases prior to the instant case (T-293), and only had two months of experience on narcotics cases when she saw Mr. Rios (T-292). She further stated that during the alleged transaction of November 21, 1973, defendant remained in bed, wrapped in a sheet (T-296). She also stated that Diaz was at the apartment on both occasions (T-305). Officer MESSINA also testified that she could not speak Spanish (T-319).

C. Defendant's Case

DR. MARIE FLEETWOOD was qualified as an expert witness in psychiatry and drug addiction (T-362 through 368). DR.

FLEETWOOD conducted an examination of Isabelio Rios in Spanish on October 8, 1974 at the Federal Detention facilities on West Street. Subsequent to this examination, DR. FLEETWOOD wrote a report (defendant's exhibit E) and diagnosed defendant as a schizophrenic, schizo-affective type, depressed (T-368, 369, 370).

During this examination, it was discovered that defendant suffers from visual hallucinations and hears noises in his head (T-371). It was determined that defendant's memory was impaired, for example, he had difficulty remembering the dates of birth

and ages of his own children (T-373, 374). The examination revealed that defendant had difficulty staying on one subject which was evidence of scattered thinking with loose association (T-374, 375). DR. FLEETWOOD concluded that Isabelio Rios suffered from "extreme anxiety", and had tried to commit suicide with a knife several times in the past. There was a demonstration before the jury where DR. FLEETWOOD pointed to defendant's scars from the suicide attempts, and needle marks from narcotics injections (T-376, 377, 378, 399). DR. FLEETWOOD testified that Dr. Chaitin's use of a priest as an interpreter interfered with defendant's willingness to volunteer information about his suicide attempts (T-385 through 386).

Another of defendant's symptoms of mental disease was his "withdrawal" or retreating into a world of his own (T-382).

Because of defendant's sickness, he had no "affective response", for example, he would smile for no reason (T-380). DR.

FLEETWOOD testified that Dr. Chaitin's report corroborated this symptom wherein it was stated "facial expression does not exhibit usual emotional response" (T-384). DR. FLEETWOOD also indicated how Dr. Schwartz's report revealed defendant's extreme preoccupation with religion (T-390), his inability to sleep, his imagination of footsteps and voices, and the unusual act of withdrawing all his money from the bank because of a fear that the bank would take it (T-400).

DR. FLEETWOOD's examination of Isabelio Rios in Spanish took place over a 1 1/2 hour period of time (T-391).

DR. FLEETWOOD emphasized the importance of spontaneous communication in order to draw the patient out, and further stated that the use of an interpreter would eliminate said crucial element of spontaneity (T-386). DR. FLEETWOOD stated that Isabelio Rios was probably in worse condition at the time of the alleged criminal acts than at trial because of his addiction to narcotics (T-394, 395, 396). Based on her examination, DR. FLEETWOOD, concluded that defendant could not have distinguised between right and wrong, nor control his impulses in November, 1973, when the alleged criminal acts occurred (T-393, 394, 398).

ISABELIO RIOS testified in his own behalf through an interpreter, and admitted that he was convicted in State Court, but could not remember the name of his other lawyer (T-464).

The defendant complained of hearing voices, inability to sleep in jail, and visions of a big woman over his head (T-466). RIOS admitted to Dr. Fleetwood that he attempted suicide on at least three prior occasions before his arrest by slashing himself across the chest with a switchblade, by stabbing himself, and slitting his wrists with a small knife (T-466). Defendant confided to Dr. Fleetwood that he was a heroin addict, using about one ounce every two weeks, but denied ever selling heroin to anybody (T-469, 470). RIOS stated that he only bought heroin

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for his own personal use because of his bleeding ulcer, and admitted that the ounce of heroin in evidence belonged to him (T-476, 477). However, RIOS denied using lactose or milk sugar to cut heroin for his own use (T-473), and denied that the money in evidence was his (T-476).

On cross-examination, defendant admitted that on November 28 he gave agent Cordero a small quantity of heroin, and that he had given small quantities to other people who were sick (T-476, 477). RIOS denied answering the door on November 29 and telling agent Cordero of a suspicion of police (T-486, 487).

D. Rebuttal

DR. RAYMOND CHAITIN, a psychiatrist employed by Kings
County Hospital, was qualified as an expert witness (T-488 through
491). DR. CHAITIN examined defendant on October 9, 1974 with
Reverand Felipe Nieves acting as interpreter (T-491, 492).
This examination was conducted pursuant to Judge Platt's order
to determine defendant's competency to stand trial. DR. CHAITIN
was satisfied with defendant's "non-verbal responses" to the
interpreter during this examination (T-495). Rios brought small
bible books to this examination that he used to help other
inmates "find God" (T-497). DR. CHAITIN characterized
defendant's thinking as "orderly" with no difficulty remembering
(T-496, 497). He stated that it was important to utilize
investigative reports prepared by the Drug Enforcement

Administration of the alleged criminal acts to make a proper diagnosis (T-503). Using investigative reports of Isabelio Rios supplied by the government, DR. CHAITIN concluded that defendant could handle a business transaction (T-498, 499, 501). DR. CHAITIN testified that, in his professional opinion, attempted suicide is not a symptom of mental disease or defect (T-503, 504). Based on his examination, DR. CHAITIN concluded that defendant was not suffering from any mental disease of defect, and was aware of his acts on November 29, 1973 (T-501).

On cross-examination, DR. CHAITIN stated that an electroencephologram (EEG) was requested by order of Judge Platt, but was not administered (T-510). DR. CHAITIN admitted that during his examination with Reverand Nieves acting as interpreter, nothing was discovered about Rios' suicide attempts (T-515, 516). DR. CHAITIN testified that the examination lasted approximately one hour, but the use of the interpreter brought the actual examination time down to about 40 minutes (T-526, 527). DR. CHAITIN also admitted that the purpose of his examination was competency, and that he discussed his report with the United States Attorney and the other prosecution psychiatrist, Dr. Schwartz, before the trial (T-531).

HARRY STEVENS, medical technical assistant at the Federal House of Detention at West Street, testified about defendant's medical records while he was imprisoned there (T-539, 540). STEVENS testified that defendant was placed on a

methadone detoxification program at West Street from November 30, 1973 to December 7, 1973 (T-543). During this time, Rios complained of womiting, shortness of breath, and severe pains, which STEVENS characterized as secondary symptoms of heroin withdrawal (T-544, 545, 546). STEVENS further stated that defendant made no other complaints that were recorded except for constipation (T-546 through 548). On cross-examination STEVENS admitted that he had no special credentials or education in the area of medicine (T-549), and that he could not speak or understand the Spanish language (T-550).

DR. DANIEL SCHWARTZ, director of Forensic Psychiatry

Service at Kings County Hospital was qualified to testify as an

expert (T-558 through 561). DR. SCHWARTZ was ordered by the

Court to examine Isabelio Rios as to his fitness to proceed,

and criminal responsiblity. This examination took place on

March 13, 1974 at Kings County Hospital, and lasted approximately

one hour (T-561, 562). DR. SCHWARTZ testified that an interpreter

was employed at this examination, but he could not recall who

it was (T-563).

DR. SCHWARTZ testified that defendant was attentive during the examination and responded to questions relevantly and coherently (T-564). In the opinion of DR. SCHWARTZ, defendant's thinking process was "orderly," and there were no obvious signs of depression or psychosis (T-566, 567). DR. SCHWARTZ also

relied on the reports of agents of the Drug Enforcement Administration to support his conclusion that defendant was aware of the alleged illegal acts and was able to conduct a business negotiation (T-568 through 570). DR. SCHWARTZ placed no importance on the suicide attempts as relating to defendant's state of mind at the time of the alleged offense (T-571), and concluded that defendant did not suffer from mental disease or defect at the time of the alleged crime (T-573). DR. SCHWARTZ admitted that he would not undertake psychotherapy through an interpreter (T-575).

On cross-examination, DR. SCHWARTZ stated that repeated suicide attempts are presumptive evidence of a serious emotional problem in the past, but he was unaware of and did not discover defendant's suicide attempts at his examination (T-582, 583).

DR. SCHWARTZ admitted that defendant had difficulty sleeping, and heard voices and footsteps during November, 1973, the time of the alleged offense (T-597, 598). DR. SCHWARTZ also conceded that approximately half of the time of the examination could have been spent in interpretation (T-588), and that the examination took 45 minutes (T-588). DR. SCHWARTZ testified he was unaware of the fact that the defendant was indicted in state and federal court and that defendant's responses to his questions could have misled him and the defendant in this regard (T-591).

POINT I

THE DEFENDANT'S CONSTITUTIONAL RIGHTS
UNDER THE DUE PROCESS CLAUSE WERE
VIOLATED BECAUSE DEFENDANT, AN INDIGENT,
SPANISH-SPEAKING PERSON, WAS EXAMINED
BY ENGLISH-SPEAKING PSYCHIATRISTS TO
DETERMINE COMPETENCY AND CRIMINAL
RESPONSIBILITY

The native language of defendant is Spanish, and he cannot understand English. After defendant was arrested on November 29, 1973, he was placed on a methadone detoxification program for treatment of his addiction to heroin (T-543). Serious questions arose concerning defendant's competency to stand trial, and his criminal responsibility at the time the alleged criminal acts occurred. Pursuant to 18 U.S.C.A. §4244, Judge Judd ordered a psychiatric examination dated February 26, 1974 (See Appendix, H) , which was subsequently conducted by Dr. Daniel Schwartz on March 13, 1974 at Kings County Hospital. However, Dr. Schwartz could not communicate with Isabelio Rios in Spanish, requiring the aid of an interpreter. Dr. Schwartz testified that he could not recall who the interpreter was, but it was the usual practice at the hospital to use employees as interpreters, such as security guards and nurse's aids (T-563). Based on this examination, Dr. Schwartz's report concluded that defendant was competent to stand trial (C-46, 47).

Defense counsel made a motion on April 5, 1974 (see Appendix, G.) to have Isabelio Rios examined by a Spanish-speaking psychiatrist. This motion was granted, and Judge Judd ordered an

examination of defendant by a Spanish-speaking psychiatrist (see Appendix)H) Dr. Marie Fleetwood conducted a psychiatric examination of defendant in Spanish on October 8, 1974. Based on this examination, Dr. Fleetwood concluded that defendant was not competent to stand trial (C-30, 31, 32, 37, 49) and diagnosed defendant as a schizophrenic "schizo-affective type, depressed" (T-370) who could not have been responsible for his acts in November, 1973 (T-393, 394, 398).

However, on October 8, 1974, Judge Platt issued an order for the purpose of determining defendant's competency to stand trial (see Appendix, K.). A third examination was conducted by Dr. Murray Chartin on October 9, 1974 at Kings County Hospital. Dr. Chaitin could not speak Spanish, and he employed the priest at the Federal House of Detention at West Street where the defendant was incarcerated, Reverand Nieves, to act as interpreter during the examination. Dr. Chaitin concluded that defendant was competent to stand trial (C-15, 16), and was not suffering from a mental disease or defect on November 29, 1973 (T-501).

Defendant contends that the use of an interpreter interfered with his ability to communicate with the English-speaking psychiatrists, and severely minimized the reliability of their diagnoses. Defendant was deprived of his rights under the Due Process Clause of the Fifth Amendment when the results of these two improperly conducted examinations were used against

defendant at the Competency Hearing and the trial. Defendant is not contending that he has a right to an interpreter during the examination (See, United States v. Desist, 384 F2d 889, 901-903 (2nd Cir., 1967); Aff'd, 394 U.S. 244 (1969)). Isabelio Rios is asserting in this appeal that the particular nature of the psychiatric interview (See, Rollerson v. United States, 343 F2d 269, 274-276 (D.C. Cir., 1964), required an examination by Spanish-speaking psychiatrist, as Judge Judd ordered.

A denial of adquate opportunity to sustain the plea of insanity is a denial of the safeguard of Due Process. . . Smith v. Baldi, 344 U.S. 561, 571 (1952) (Frankfurter, J., dissenting)

In 1963, the California State Advisory Commission to the United States Commission on Civil Rights recognized the severe problems that can arise when Spanish-speaking people attempt to communicate with the different parts of the judicial system:

It appeared to the Committee,...
that while the Spanish-speaking
groups do not feel that their
problems are as exacerbated as
the Negro's, their problems are
complicated by the additional
fact that many speak mainly
Spanish. Often, apparently,
Spanish-speaking persons literally
do not understand what is happening
to them in contacts with the police,
district attorneys and some courts....
This language difficulty seems a

real one to the Committee. It also appears that many law enforcement officials are not cognizant of it. California State Advisory Committee to the U.S. Commission on Civil Rights, Police-Minority Group Relations in Los Angeles and the San Francisco Bay Area, at 37 (1963)

Mexican-Americans and the Administration of Justice
in the Southwest, a report of the United States Commission on
Civil Rights (March, 1970), devoted an entire chapter to
"Language Disability and Inequality bofore the Law" (Chapter 9).
Although that report concerned Spanish-speaking people in the
Southwest, its subject matter is certainly relevant to the case
at Bar. As the report stated:

. . . Many judges in the Southwest do not realize the extent of language limitation among Mexican-Americans and are unaware of the extent to which it interferes with their ability to defend themselves. Id, at 69.

The report vehemently criticized the use of interpreters who are not professionally trained. Where "makeshift arrangements are the rule," it is impossible to determine the quality of the interpretation, <u>Id</u>, at 72-73. The case at Bar provides a glaring example of this questionable procedure, considering that Dr. Schwartz used an unidentified "employee" of the hospital, and Dr. Chaitin employed a priest whose qualifications as an interpreter were unknown.

The importance of understanding a patient's cultural and language background in determining whether mental problems exist cannot be underestimated (See, Del Castillo, The Influence of Language Upon Symptomatoglogy in Foreign-Born Patients, American Journal of Psychiatry, 127: 242-244 (1970). Del Castillo described several clinical experiences in which Spanish-speaking patients appeared obviously psychotic during native-tongue interviews but seemed much less so, and even without any overt psychotic symptoms, when the interview was conducted in English. In this latter report, the interviews were part of pretrial examinations. (Id.) There is considerable evidence that psychiatric judgments are strongly influenced by the socioeconomic backgrounds of the doctor and his patient. (See, Ennis, Bruce and Litwack, Thomas, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693, 724-726 (1974).

Analagous to the case at Bar is Morales v. Turman,

383 F. Supp. 53 (E.D. Texas, 1974). In that case, the court
established standards of treatment for detecting mental
retardation in juvenile delinquents incarcerated in reformatories.

The court stated that a juvenile had a "right to treatment"
requiring "minimal professional standards," such as:

1) Normal IQ and achievement tests (both verbal and non-verbal) must be utilized, with special emphasis on tests which are appropriate for the student's background.

^{*}See Appendix Page R.

2) Examiners who are familiar with the background of the student and language must be a part of the staff. Id, at 89-90 (emphasis added) Dr. Marie Fleetwood, Assistant Professor of Psychiatry has taught medical students, residents, psychiatrists, social workers, and psychologists over the past twenty-five years (T-363 through 366). While testifying at the trial, Dr. Fleetwood expressed her professional opinion on the use of interpreters during psychiatric examinations: Q: Have you talked to any of the residents, the hundred residents that have studied under you to do a psychiatric examination through an interpreter? Mr. Katzberg: Objection. The Court: Overruled. You may answer whether you ever instructed on how to conduct a psychiatric examination through an interpreter. The Witness: I really don't recommend it. Or if it is not possible, to use three or four different interpreters. Because, you see, you have to deal with the personality of the interpreter and the patient. And it is very difficult. They may -- they would have to use two or three different interpreters. We get some facts about reality. Q: Have you ever interviewed anyone in any other language besides English and Spanish? A: Well, I took a little French and Italian. Q: You have diagnosed people in those languages, too? - 27 -

A: Um-hm. But you wouldn't venture to diagnose anybody in any other language? You would have to have the psychiatrist that spoke that language? A: Right. That would be the best technique? Yes. Everybody would also agree. Is this the advice you would give 0: your students? A : Yes. The doctors that are studying under you? That is part of the reason that there A: are so many people that are learning Spanish now. You mean, so many -- are you talking about doctors? Doctors, social workers, psychologists. There appear to be no cases directly on point. However, precedents are not necessary to emphasize the prejudice that Isabelio Rios suffered because of the testimony of the two non Spanish-speaking psychiatrists. Defendant was clearly denied the opportunity to properly establish his mental condition at the time of the trial, and at the time of the alleged criminal acts. This infringement on defendant's Due Process rights must be rectified by reversing the conviction or, in the alternative, remanding for further examination by Spanish-speaking psychiatrists. - 28 -

POINT II

THE IMPROPER ADMISSION OF TESTIMONY
ON THE ISSUE OF CRIMINAL RESPONSIBILITY
BY PSYCHIATRISTS WHO DID NOT CONDUCT A
PROPER EXAMINATION WAS EXTREMELY
PREJUDICIAL, BASED ON HEARSAY, AND
DENIED DEFENDANT HIS RIGHT TO A FAIR TRIAL

A. The Examination by Dr. Chaitin

Dr. Raymond M. Chaitin examined Isabelio Rios on October 9, 1974, pursuant to an order by Judge Platt (See Appendix, P.) to determine defendant's competency to stand trial. However, over defense counsel's continuing objection (T-493), Dr. Chaitin testified about defendant's mental state at the time of the alleged criminal acts. Dr. Chaitin partially based his conclusion that defendant was criminally responsible in November, 1973 by the manner in which defendant answered questions concerning charges in the indictment (T-495 through 498). This was the exact same approach Dr. Chaitin used to determine that defendant was competent to stand trial (C-12 through 14). Dr. Chaitin also based his conclusion that defendant was sane at the end of November, 1973, on investigative reports of the agents of the Drug Enforcement Administration T-498 through 503). Did Dr. Chaitin conduct an examination of a human being, or did he merely draw conclusions from the investigative reports and the indictment?

Furthermore, this examination was conducted through an interpreter, the priest at the Federal House of Detention, Rev. Nieves, and lasted approximately 45 minutes (T-588). The

use of a priest as an interpreter was extremely improper, especially since his qualifications as an interpreter are unknown. It is not surprising that Dr. Chaitin did not discover defendant's repeated suicide attempts under these circumstances. The following testimony by Dr. Fleetwood is pertinent:

Q: What do you think the effect would be in your professional estimation of a psychiatrist utilizing a priest as an interpreter during an interview with a man of the-who has the qualities and senses of being and as being in a schizophrenic status that this Mr. Rios has?

Mr. Katzberg: Same objection.

The Court : Overruled -- you may answer.

The Witness: Well, in the Catholic religion, to try to commit suicide is a mortal sin. And I don't really think that Mr. Rios will volunteer that. He didn't volunteer anything for me either. Some of the questions I had to get it out of him (T-385 through 386).

Defendant contends that Dr. Chaitin was unqualified to testify on the issue of criminal responsibility because of the obvious limited scope of the examination. Defendant further contends that the examination itself was improper because Rev. Nieves' participation as interpreter. Defendant had waived his rights to a speedy trial (T-734) with the expectation of being examined by a Spanish-speaking psychiatrist. To allow Dr. Chaitin's testimony on the issue of criminal responsibility would be patently unfair.

Where the community fails to supply-for those who cannot—the effort and resources required for an adequate exploration of the issue, the trial becomes a facade of regularity for partial justice. Rollerson v. United States, 343 F2d 269, 276 (D.C. Cir., 1964).

A psychiatric examination to determine a defendant's competency to stand trial requires an entirely different scope and degree of thoroughness than an examination to determine criminal responsibility. United States v. Schultz, 431 F2d 907, 912 (8th Cir., 1970); United States v. Driscoll, 399 F2d 135 (2nd Cir., 1968); Winn v. United States, 270 F2d 326 (D.C. Cir., 1959), cert. denied, 365 U.S. 848 (1961). "...The judge's order should indicate the distinctive medico-legal issues involved." Johnson v. United States, 344 F2d 401, 406 (5th Cir., 1965). In the case at Bar, Judge Platt's order requested a determination of competency. This was in obvious contrast to Judge Judd's order to determine both competency and criminal responsibility.

There is strong authority for the contention that an examination pursuant to 18 U.S.C.A. §4244 cannot be overly expanded to the prejudice of defendant. <u>United States</u> v. <u>Malcolm</u>, 475 F2d 420, 423-424 (9th Cir., 1973); <u>United States</u> v. <u>Driscoll</u>, <u>Supra</u>, at 137. However, defendant is aware of authority that under "certain circumstances" a psychiatrist who has examined for competency <u>may</u> be qualified to testify on the issue of criminal responsibility. <u>United States</u> v. <u>Jacquillon</u>,

469 F2d 380, 389 (5th Cir., 1972); cert. denied, 410 U.S. 938 (1973).

Whether a psychiatrist is so qualified depends in each instance on what the record reveals was the actual scope of the examination. Id

The "actual scope" of Dr. Chaitin's examination was limited to competency. The nature of his examination was cursory, and his ability to communicate directly with Isabelio Rios was practically nil.

For a psychiatrist who examined defendant for the purpose of determining competency to stand trial, and then testify on the issue of criminal responsibility "offended notions of fairness" and requires a reversal. <u>United States v. Driscoll</u>, Supra, at 137. As Judge Feinberg stated in that case:

The issue transcends technicality. We do not believe that a defendant can be told he is to be examined for one purpose and once his cooperation is obtained, be advised of another. Id

B. The Examination by Dr. Schwartz

Dr. Daniel Schwartz examined defendant on March 13, 1974, pursuant to an order by Judge Judd to determine defendant's competency to stand trial, and criminal responsibility during the time of the alleged criminal acts. Dr. Schwartz used an interpreter, but he could not remember who it was (T-563). It is respectfully noted that there is no evidence that the interpreter Dr. Schwartz utilized was qualified to translate accurately. Dr. Schwartz admitted that he partially relied on

the interpreter to form his diagnosis of defendant. For example:

The interpreter told me that the statements made sense to him; that it wasn't a confused profusion of language pouring out. (T-564).

Defense counsel objected on hearsay grounds to Dr.

Schwartz testifying to what the interpreter said, and to what the defendant allegedly told the interpreter who then translated to Dr. Schwartz, but was overruled. (T-564, 565). Counsel respectfully submits that the lack of records by Dr. Schwartz as to who the interpreter was is an example of the quality and depth of the examination performed.

Dr. Schwartz admitted that approximately half of the

Dr. Schwartz admitted that approximately half of the examination could have been spent in interpretation (T-588).

Defendant contends that this is a highly improper method of conducting a serious examination to determine criminal responsibility. Furthermore, Dr. Schwartz did not discover defendant's repeated suicide attempts at this examination, nor did he discover the defendant's bleeding ulcer.

The importance of this omission was revealed on cross-examination, as follows:

Q: Let's not talk about the unfortunate; let's talk about good medical practice. What about a man who tries to kill himself not once, not twice, but three times. Would you, on evaluating such a man, with that information given forth to you, wouldn't you say that

person had a past history of mental illness and had somehow been treated for it because he was put in a hospital each time? If that's all I knew about it, I would say there's presumptive evidence of a serious emotional problem in the past, yes. This man did not tell me that, though. When you wrote your report that he had no difficulty in describing events, now, knowing that this man has a past history of trying to commit suicide, wouldn't you say he had difficulty in describing events to the doctor when he was "Did you ever have any asked. mental illness or kind of history like that?" Wouldn't that be difficult to describe, the events? It might be difficult or might A: be his choice not to. He did not say that in the past he had thought of killing himself. But he didn't tell you anything else. Also, it might have been a difficulty for him communicating through the interpreter to you that he didn't perhaps think of trying to kill himself but he had told the interpreter in the past he had tried to kill himself, that's a possibility, too, isn't it, Doctor? A: Yes (T-582, 583) The following cross-examination of Dr. Schwartz is extremely revealing: Do you know whether or not one is excommunicated from the Catholic Church for committing suicide? A: For committing it. - 34 -

The Court: Attempting? The Witness: It's my understanding and I'm not Catholic, that the Church will take into consideration the man's state of mind if any such charges are brought against him to warrant excommunication and that I think in this day and age, in most cases, it would be clear the man was seriously ill and that what he did was a product of the illness not of any anti-Catholic philosophy. (emphasis added) * (T-610)*The above statement of Dr. Schwartz clearly indicates that Rios was insane. Defendant further contends that the admission of Dr. Schwartz' testimony clearly violated the hearsay rule because it was based entirely on defendant's statements to an unidentified interpreter whose qualifications were not established or known. The law is clear that the testimony of a witness may not be admissible if the conversation he allegedly took part in was not discernable to the witness because of a language barrier: A person conversing with a third person through an interpreter is not qualified to testify to the other person's statements, because he knows them only through the hearsay of the interpreter. Ordinarily, therefore, the third person's words cannot be proved by anyone except the interpreter himself. 3 Wigmore, Evidence §812(3) (Chadbourn rev., 1970) Defendant was deprived of his opportunity to crossexamine the interpreter utilized by Dr. Schwartz. especially critical considering that Dr. Schwartz admitted that - 35 -

the interpreter aided in his diagnosis of the defendant (T-564). The trial judge, Honorable Judge Judd, expressed the view that "It would have been better if we had some record who the interpreter is." (T-565), but overruled defense counsel's timely objection to Dr. Schwartz' testimony on hearsay grounds (T-564-566).

The instant case is clearly analagous to two New York State cases. In Gaudino v. New York City Housing Authority,
23 A.D. 2d 838, 259 N.Y.S. 2d 478 (1st Dept., 1965), it was held to be error for an intern to read portions of a hospital record of the plaintiff because the hospital record was made from conversations between the plaintiff and the intern through an interpreter. Scotto v. Dilbert Bros., Inc., 263 A.D. 1016,
33 N.Y.S. 2d 835 (2nd Dept., 1942), held that it was error for a policeman to testify to a conversation of a plaintiff conducted through an interpreter, especially since the interpreter was not called to testify as to the correctness of his interpretation.

See also, People v. Chin Sing, 242 N.Y. 419, 152 N.E. 248 (1926).

It is respectfully argued that the aforementioned New York State cases, the state in which the Eastern District of New York is located, are the only cases directly on point. It is prayed that the aforementioned cases will be scrutinized by this Honorable Court before reaching a decision on the instant appeal.

Appellant argues that the testimony of Dr. Schwartz was a decisive factor in both his competency hearing before Judge Platt and the trial before a jury. It is respectfully

submitted that the jury, in all likelihood, would have rendered a verdict of not guilty on the grounds of finding the defendant insane but for the testimony of Dr. Schwartz.

Defendant further argues that the testimony of Dr.

Chaitin was also hearsay in that the conversations were also heard through an interpreter. Guadino, Id., Scotto, Id., and People v. Chin Sing, Id. It was perhaps even a more grievous error in the latter case of the conversation between the defendant and Dr. Chaitinbecause of the fact that the interpreter was the Appellant's priest and there was no notice to the Appellant that his confidential relation with the priest and/or doctor was being compromised. Appellant notes the fact that the priest and doctor were unable to ascertain the fact that the defendant had attempted suicide on at least three separate occasions.

To find that the above noted conversations between doctor and patient (here the Appellant, through an interpreter, were not hearsay and were admissible as evidence would be to thwart the purpose and interest of the rule and result in a mockery of justice.

Wherefore Appellant respectfully prays that the instant appeal be granted and that the case be reversed and remanded to the District Court for a new hearing on the issue of Appellant's competency to stand trial and/or a new trial.

POINT III

JUDGE PLATT'S DETERMINATION THAT ISABELIO RIOS WAS COMPETENT TO STAND TRIAL WAS "CLEARLY ERRONEOUS" BECAUSE IT WAS BASED ON THE TESTIMONY OF PSYCHIATRISTS WHO CONDUCTED IMPROPER EXAMINATIONS AND WERE NOT QUALIFIED, ACCORDING TO 18 U.S.C.A. §4244, AND ON THE JUDGE'S ASSUMPTION THAT THE GOVERNMENT WOULD DISMISS THE CONSPIRACY COUNT OF THE INDICTMENT.

hours on October 8, 1974 (C-6, 26). This examination was conducted in Spanish, the only language defendant can understand. Dr. Fleetwood testified that because of defendant's anxiety and depression, his memory was inconsistent, and he contradicted himself (C-16). These characteristics plus defendant's inability to communicate in a logical manner during the examination supported Dr. Fleetwood's conclusion that defendant could not communicate with his attorney. As Dr. Fleetwood stated:

I don't see how you are going to make any sense about what he said. (referring to defendant). What I'm afraid he will tell one thing at one time and the other thing about the other time because he will not remember what he said before (C-58).

Concerning the defendant's ability to comprehend the nature of the legal proceedings, Dr. Fleetwood's examination revealed that defendant "had the idea that everything was going to be fine. . " (C-23). Defendant also expected to be released

from prison soon and hoped to go back to Puerto Rico, where his brother was supposedly going to offer him a home. Considering the reality that was actually facing defendant, Dr. Fleetwood felt his attitude was "very unrealistic" (C-23, 24). Note also that the defendant's conviction in State Court and his sentence under a Class A felony. The aforementioned factors plus the discovery that defendant repeatedly attempted suicide (C-12, 13), led Dr. Fleetwood to state:

. . . I don't really think he has enough love for himself that he does not care whatever happened to him and that he's not competent to stand trial (C-31).

Defendant was also examined by Dr. Daniel Schwartz on March 13, 1974 and by Dr. Raymond Chaitin on October 9, 1974 (C-39, 10). These psychiatrists determined that defendant was competent to stand trial. However, these psychiatrists do not speak Spanish, making it necessary to employ the services of an interpreter during their respective examinations of defendant. Dr. Schwartz was unable to identify the interpreter he utilized (T-563). Dr. Chaitin, a law school graduate, utilized the priest of the inmates at the Federal House of Detention, Rev. Nieves, as interpreter during his examination (C-12), and failed to comply with Judge Platt's order to conduct an electroencephologram (EEG) examination. Dr. Schwartz and Dr. Chaitin failed to discover that defendant had made at least three serious suicide attempts (C-55, 56, C-37). It is reasonable to infer that these crucial facts were not discovered because of the inevitable

difficulties of examining a patient through an interpreter.

Using a priest as interpreter would make it that much more difficult for a person to reveal his suicidal tendencies. Dr. Chaitin, himself, "had no way of knowing" whether or not defendant felt "open" in the presence of the priest (C-30). Furthermore, neither of the interpreters that were used were qualified on their abilities to interpret accurately. The use of the interpreters further diminished the already minimal amount of time actually spent examining and communicating with defendant.

Dr. Chaitin examined defendant pursuant to an order by Judge Platt. (See appendix, p. K) As part of this order, an electroencephalogram (EEG), which tests the presence of organic brain disorders, was to be administered upon defendant. Dr. Chaitin admitted that Judge Platt's order had not been complied with in this respect (C-21, 22).

The test of mental competency under 18 U.S.C.A.

§4244 is whether a defendant has sufficient present ability to
consult with his attorney with a reasonable degree of rational
understanding and whether he has a rational and factual understanding of the proceedings against him. Dusky v. United States,
362 U.S. 402 (1960); Drope v. Missouri, _______, 43 L.Ed²103,
(1975) (No. 73-6038). 18 U.S.C.A. §4244 clearly states that upon
a motion to determine competency

...The court shall cause the accused...to be examined as to his mental condition by at least one qualified psychiatrist. (Emphasis added)

Defendant contends that the statute was not complied with in this particular case because a "qualified psychiatrist"

means one who could examine defendant in Spanish. Only a Spanish-speaking psychiatrist, such as Dr. Fleetwood, was qualified to examine Isabelio Rios. Only Dr. Fleetwood discovered defendant's suicide attempts, his inability to remember the years in which his children were born, and his fantasies of leaving jail soon. Therefore, only Dr. Fleetwood's testimony was admissible and/or available for utilization as the basis of a judicial decision.

Dr. Chaitin's use of a priest as an interpreter indicates he was as careless during the examination as he was in failing to have the EEG administered, pursuant to Judge Platt's order.

Defendant contends that the use of interpreters to aid in the determination of competency, especially those who are not qualified for accuracy (C-73), does not comport with the terms of the statute because it prevents a proper examination. Dr. Schwartz admitted that the use of the interpreter could have caused the difficulty in determining whether defendant was aware of State or Federal charges against him (C-70, 71). The following question and answer during cross-examination of Dr. Schwartz is quite revealing:

Q: Would you go to a doctor that spoke the Spanish language and be analyzed through an interpreter?

A: No. (C-74)

Defendant is completely aware that the determination of competency is primarily within the discretion of the trial judge and the standard of review is whether the determination was "clearly erroneous" United States v. Sullivan, 466 F.2d 180, 185

(2nd Cir., 1969); Feguer v. United States, 302 F.2d 214, 236 (8th Cir., 1962); cert. denied, 371 U.S. 872 (1972).

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States

Gypsum Co., 333 U.S. 364, 395 (1948)

It is respectfully submitted that an extremely prejudicial mistake was committed when a Spanish-speaking defendant was examined by English-speaking psychiatrists through interpreters of unknown quality.

The case at Bar is clearly analagous to cases in other circuits where a trial judge's determination of competency was reversed and remanded. In Krupnick v. United States, 264 F.2d 213 (8th Cir., 1959), petitioner, a drug addict, sought to have his sentence vacated under 28 U.S.C.A. §2255, claiming that he was incompetent at the time of his conviction and that the trial court erroneously adhered to the opinion of a physician rather than conduct an examination by a qualified psychiatrist. The Court of Appeals ruled in favor of petitioner, holding that 18 U.S.C.A. §4244 "does not authorize the court to substitute an examination and report of a general physician for that of a psychiatrist... " Id., at 218. United States v. Day, 333 F.2d 565 (6th Cir., 1964), held that an examination conducted by a chief probation officer to determine mental competency of appellant at time of sentencing was clearly insufficient, and appellant was entitled to an examination by an expert psychiatrist. Furthermore, it has been declared an abuse of discretion for a trial judge to allow the testimony of lay witnesses to carry

greater weight than the reports of expert psychiatrists when competency is determined. <u>United States v. Gray</u>, 421 F.2d 316 (5th Cir., 1970). Defendant contends that Drs. Schwartz and Chaitin were poorly qualified <u>in this particular case</u> because they could not communicate with defendant directly in Spanish. Their testimony deserved little, if any, weight.

It is respectfully submitted that the examinations conducted by Drs. Schwartz and Chaitin were "erroneously conducted." and the appropriate remedy is to reverse the conviction and remand to the District Court for a competency hearing and a new trial if the accused is found competent. United States v. Pogany, 465 F.2d 72, 79 (3rd Cir., 1972).

POINT IV

DEFENSE COUNSEL'S MOTION FOR ACQUITTAL WAS IMPROPERLY DENIED BECAUSE ANY REASONABLE JURY WOULD HAVE A REASONABLE DOUBT REGARDING DEFENDANT'S CRIMINAL RESPONSIBILITY.

Overwhelming evidence was introduced to prove that defendant was insane in November, 1973, the time of the alleged criminal acts. It is respectfully submitted that the prosecution did not meet its burden of proving defendant's sanity beyond a reasonable doubt. However, Defense Counsel's motion for acquital after presentation of all the evidence was denied (T-624, 625).

During the time of the alleged criminal acts, defendant was a heroin addict, spending \$200 per day to support his habit (T-469, 470). Dr. Fleetwood diagnosed defendant as a schizophrenic, "schizo-affective type, depressed," (T-370) after a thorough examination conducted in Spanish (See appendix, p. M) Dr. Fleetwood's diagnosis was made in October, 1974, but in her professional opinion, defendant was in a worse condition in November, 1973 because of his addiction to heroin (T-393-395). Isabelio Rios suffered from "extreme anxiety" which was partially manifested in the past by repeated suicide attempts (T-376-379). When defendant testified on his own behalf, he explained to the court how he used a knife on three different occasions, attempting to kill himself (T-466).

One symptom to support the diagnosis of schizophrenia was defendant's strong tendency to experience hallucinations, such

as a big woman calling to him (T-371, 466). Dr. Schwartz, who testified for the prosecution and disagreed with the diagnosis of schizophrenia (see appendix, p. F), admitted that defendant suffered from extensive hallucinations in November, 1973. Schwartz stated that defendant heard footsteps and voices calling him (T-597, 598). Furthermore, Dr. Schwartz described how defendant withdrew all of his money from the bank because of an imagined fear that the bank intended to take the deposits (T-400). Another symptom to support the diagnosis of schizophrenia was defendant's "affect," or his ability to respond appropriately. Dr. Fleetwood testified that defendant's "affect" was "flat... almost like dead," and he would smile without any reason (T-380). This symptom was corroborated by the report of Dr. Chaitin, wherein it was stated that defendant's "affect" was "flat" and "constricted" (T-384-385). The fact that defendant suffered from "withdrawal," or retreating into a world of his own, further supports the conclusion that he was suffering from mental disease and was not criminally responsible in November, 1973.

It is well-settled that once defendant rebuts the presumption of sanity, the government is then required to prove legal sanity beyond a reasonable doubt. Davis v. United States, 160 U.S. 469 (1895); Tarvestad v. United States, 418 F.2d 1043 (8th Cir., 1969), cert. denied, 397 U.S. 935 (1970). If a defendant properly rebuts the presumption of sanity without the government meeting its burden, and a conviction is obtained, a reversal is required. United States v. Mercado, 469 F.2d 1148 (2nd Cir., 1972) (Probation revocation hearing); Nagell v. United

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States, 392 F2d 934 (5th Cir., 1968); Argent v. United States,
325 F2d 162 (5th Cir., 1963); Philips v. United States, 311 F2d
204 (10th Cir., 1962); Fitts v. United States; 284 F2d 108 (10th
Cir., 1960); Isaac v. United States, 284 F2d 168 (D.C. Cir.,
1960); United States v. Westerhausen, 283 F2d 844 (7th Cir.,
1960); Satterwhite v. United States, 267 F2d 675 (D.C. Cir.,
1959); McKenzie v. United States, 266 F2d 524 (10th Cir., 1959);
Fielding v. United States, 251 F2d 878 (D.C. Cir., 1957).

It is respectfully submitted that a verdict of acquittal was appropriate because, upon considering all the evidence, a reasonable mind must have had a reasonable doubt regarding defendant's sanity in November, 1973. <u>United States v. Taylor</u>, 464 F2d 240, 243 (2nd Cir., 1972).

The nature and quantum of evidence of sanity which the government must produce to sustain its burden and take the issue to the jury will vary in different cases. Evidence of sanity which may suffice in a case where defendant has introduced merely "some evidence" of insanity may be altogether inadequate in a case where the evidence of insanity is substantial. Wright v. United States, 250 F2d 4, 7 (D.C. Cir., 1957); See Brock v. United States, 387 F2d 254, 258 (5th Cir., 1967).

In the case at Bar, evidence of insanity was "substantial." After a thorough examination, Dr. Fleetwood arrived at her conclusion based on many symptoms, some of which were corroborated by the psychiatrists who testified for the prosecution. Isabelio Rios testified about the terrible problems he encountered in November, 1973. The "nature and

quantum of evidence" introduced by the government was minimal. The government's psychiatrists agreed that symptoms of schizophrenia existed, but disagreed with the diagnosis. Considering the superficial nature of the examination conducted by the government psychiatrists (See Point II), the evidence of insanity was not properly rebutted. It is respectfully submitted that this case should not have gone to the jury.

CONCLUSION

For all of the aforementioned reasons, the judgment of the District Court should be reversed with instructions to dismiss the indictment or, in the alternative, remanded for a new trial after further psychiatric examination of defendant by a Spanish-speaking psychiatrist.

Respectfully submitted,

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*Attorney for Defendant-Appellant acknowledges and appreciates the work of Richard L. Seltzer, a second-year law student at Hofstra Law School, in the preparation of this brief.

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

Plaintiff, : 73 Cr. 1042

-against-

ISABELIO RIOS, :

Defendant.

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THE UNI	TED STATES		For U. S.:	Ti Wood held
3	vs.	_	/ /	v. Wo anger
ISABELIO	O RIOS also kno	own as	DODE CON	
Rafael N	Miranda also kn	nown as		
"Chewy"	NELIAS NIEVES	and		
χ IGNACIO	AYALA-DIAZ	1996	1-30-73	Magis Schiffma Axxxx RIOS
				t: STEWART SHAW
				dway, NYC.
Ý			233-8991	
1-1/2-1				
Did possess with intent t	o distribute h	eroin		
		CASH REC	EIVED AND DISBU	RSED
ABSTRACT OF COSTS	AMOUNT	. NAME	, 1	RECEIVED DISBURS
Fine, (Isabelio Rios) 70	00 00 2/1/25	PATELLE PALLE	(120 fo)	
Clerk,		& Ringor	i like	
Marshal,		7.7		
Attorney,				
Commissioner's Court,				
Witnesses,				
(-)				
				* No. 1
,				
DATE		PROCEEDINGS		
12-6-73 Before BARTELS I				
deft RIOS not pres	sent - court di	rects entries	of pleas	of not
guilty on behalf o	of all defts -	bail condition	ns continu	ed as to
all defts - case a	adjd to 2-19-74	for trial.		
RAKKARAKARAKAKARAKARAKARAKARAKARAKARAKA	ACDARKENAK AD	pus. AdxPraken	IKHKUMXXXXXI	ZKKIRZXKKKIR
2/20/73	AL/ARMANAARA	<u>.</u>	ran V	
2/20/73	was for that	711cd (13.70 s	ARS)	,,
	THE RESERVE OF THE PROPERTY OF		10 .	
12-28-73 Magistrate's file	73 M 1778 inse	rted into CR 1	fila for	daft Dian de El
1-9-74 Notice of Motion f Inspection, Bill o	f Particulars	and summers 2	or Discover	ry and
A SECTION BILL OF		B1		

73 CR1042

		CLERK	'S FEES	
DATE	PROCEEDINGS	PLAINTIFF	DEFENDA	NT
1-11-74	Pefore JUDD, J Case called - Deft Rios and counsel Stu	art Shaw	anu and	
	present - Deft Diaz present without counsel - Motion for inspection, bill of particulars, etc. argued - motion of	enied in	part a	and
)	granted in part- Case adjd to 2-19-74 Before JUDD, J - case called - defts present - counsel			
2-19-74	for Mr. Shaw - Daisy Santos interpreter sworn	GOVES III	octon	
	for one week adjournment - Motion granted - case adjd	to 2-25-	74 for	-
	before JUDD, J; + Case called - Defts and counsel present	nt- J.R.	Guma	4:
2-25-74	present as interpreter- Case as to defts Nieves and D	laz adja	to 3-2	5-74
-	Deft Diaz to remain in State Custody and the Govt to s	ubmit a d	eteine	-
2-26-74	Case as to deft Rios adjd to 2-26-74 Before JUDD, J - case called - deft RIOS & counsel Ste	wart Sha	w	
2-20-74	present - defts motion for psychiatric examination is	granted	- der	<u> </u>
	committed for psychiatric examination pursuant to 18	:4244 at	Kings	
2-26-74	County Medical Center - Govt to prepmare Order. By JUDD, J - Order filed that the deft (ISABELIO RIOS)	is comm	itted	-
	to Kings County Medical Center pursuant to 18:4244 for to exceed 30 days for study and report as to his men	a perio	d not	
-	etc. and further Ordered that the Clerk deliver cert	ified con	ies	
1	of this Order to the U.S.Marshal.			
-25-74	Before MISHLER, CH J - case called - adjd without date on consent. (RIOS)			_
3-25-7	Before JUDD, J - case called - deft Rios present wit	hout cou	nsel -	
+	referred to Ch.J.Mishler for trial.			
-28-74	Memorandum to Judge Judd from Judge Mishler filed RE:			
1-5-74	Notice of motion for an order requiring a psychiatric		ion of	def
	by a Spanish speaking doctor filed-rec. 4-18-74 (RIC	or presen	t -	-
4-18-74	Before JUDD, J - case called - deft RIOS & counsel no motion marked submitted - motion granted - no opposi	ition (fo	r	
	psychiatric examination of deft) deft RIOS' counsel	to submit	praer	
-19-74	By HDD I - Order filed that the deft RIOS is comm	Inted to	Trigo	
	County Medical Center pursuant to 18:4244 for a periodays for study and report as to his mental competence	a not to	exceed	30
	It is further Ordered that said psychiatric examinat	ion be co	nducte	đ
	by a Spanish speaking doctor and Clerk to deliver co	ples to !	J. S. Mar	eha1
	Copies forwardedas directed. B2		-	-
-24-74	Contified on a of Ondon deted is to als		A CONTRACTOR OF THE PARTY OF TH	

18

DATE	PROCEEDINGS
5-31-74	Voucher for compensation of counsel filed (NIEVES)
-30-74	Before PLATT, J Case called- On motion of A.U.S.A. Schall the indictmen
	is dismissed as to deft NIEVES and AYALA-DIAZ
8-30-74	By PLATT, J Order of dismissal filed
-30-74	By PLATT.J Copy of Order releasing bail filed (NIEVES)
-11-74	Before Platt, J - case called - deft Isabelio Rios & counsel
	Mr. Shaw present - adjd to 9-16-74.
16/74	Before PLATT, J Case called - Adjd to Nov. 4, 1974
10/8/74	By PLATT, J Order filed that the deft ISABELIO RIOS be committed to Kings County Medical Center pursuant to T-18, U.S.C. Sec. 4244 for a
	study as to his mental competency, etc. (copies sent to Marshal)
10/15/	4 Certified copy of above order of commitment retd and filed executed
11/1/74	1/ Takammakam
	sworn- Deft RIOS' motion to dismiss- decision reserved- Adjd to
	11/15/74 for hearing
11/22/74	Before PLATT, J .= Case called- Deft and counsel Stuart Shaw present-
	Interpreter sworn- Competency hearing ordered and begund Hearing conta
	to 11/25/74 at 9:30 A.M. (RIOS)
1/25/74	Before PLATT, J Case called- Hearing resumed- Deft and counsel present
2-2-74	By PLATT, J - Order filed an motion to dismiss indictment, etc.
	(Deft ISABELIO RIOS)
12-2-74	Before Platt, J - case called - hearing resumed - case referred
	to Judge Judd
12-2-74	Before Judd, J - case called & adjd to 12-4-74 for trial.
12-2-74	Voucher for Expert Services filed (Isabelio Rios)
12-4-74	Worker for Expert Services filed (Rics) J. Guma, Int.
2/4/74	Before JUDD. J Case called- Trialbrdered and begun- Interpreter Lworn-
	On motion of A.U.S.A. Katzberg count 3 is dismissed- Govt opens- Deft
	opens- Trial contd to 12/5/74 at 10:00 A.M. (RIOS)
12/5/94	Voucher for exeprt services filed (RIOS) (court reporter)
2/5/74	Before JUDD. J Case called- Deft and counsel present- Trial resumed
	Govt rests- Trial contd to 12/9/74 at 10:00 A.M.
2/6/74	Copy of Subpoena to Isabelio Rios filed.
12-9-74	Pefere Judd I - case called - deft Rios & counsel Stuart Shaw
	argued and motion denied - deft rests - Govt opens on rebuttal -
	Trial contd to Dec. 10, 1974.

DATE	PROCEEDINGS
10-74	3 stenographic transcripts filed one dated Nov. 22, 1974; one dated
160	2 1074 and one dated Dec. 9. 19/4.
2-10-7	The respective to the case called - deft RIOS & counsel Stuart Shaw
	present - trial resumed - Govt rests on rebuttal - both sides rest -
\$ ·	defts motion to dismiss argued and motion denied - deft sums up -Govt
64	sums up - judge charges jury - Marshals sworn - alternates discharged -
	Jury retires to deliberate at 3:00 PM. Jury returns at 5:10 PM and renders
V	a mardiat of guilty on count 1 and not guilty on count 2 - jury polled -
7	Trial concluded - Jurors discharged - bail conditions continuted - adjd
Jane	without date for sentence.
/11/74	Voucher for expert services filed (RCOS) (court reporter)
-12-74	Voucher for expert services filed (Rios) Joacquim Guma-for interpreting)
-12-74	Before JUDD, J - case called - deft ISABELIO RIOS present without
1 11 12	counsel - Govts application to remove bail requirements - application
1.65.7	granted - deft turned over to State authorities with proviso that the
	U.S. marshal file a detainer.
13/74	Memorandum from U.S. Marshal re:withess William Gonzalez and 2 trial
	subscene (a filed (RIOS)
3/75	Voucher for expert services filed (RIOS) (psychiatric examination)
22/75	Petition for writ of habeas corpus ad prosequendum filed (RIOS)
-175	Ry HIDD J writ issued, ret, 1/31/75
75	Before JUDD, J - case called & adjd to 2-7-75 at 2:00 PM(sentencing(RIOS)
1/75 7-75	Woucher for expert services filed (interpreter) (Rios) Before JUDD, J - case called - deft Rios-Carmona & counsel S.Shaw
	present - Joaquin Guma sworn as interpreter - deft sentenced to imprison-
11111111	ment for 6 years plus 5 year special parole term; deft fined \$7,000 - con
100	recommends that defts term begin in State prison and that he be sent
C 86-	to an institution with psychiatric facilities while in Federal custody.
*	Deft advised of right to appeal.
7-75	Judgment & Commitment filed - certified copies to Marshal (RIOS-CARMONA)
7/75	W. waher for expert services filed (RIOS)
10/75	
	12-9-74 and 12-10-74(2)
2-11-	
-17-7	Notice of Appeal filed (Isabelio Rios)
17-75	Docket entries and duplicate of Notice mailed to the Court of Appears
1. 1 ·	(Isabelio Rios)
25/75	Stenographers Transcript dated 2/7/75 filed

73 CR 1042 CRIMINAL DOCKET

DATE	PROCEEDINGS
	Voucher for expert services filed(RIOS) (interpreter) By JUDD, J - Order filed extending time to appeal (RTOS)
7/75	voucher for expert survey of the to appeal (RTOS)
12-75	By Judd, 3 - Older 1110
	•
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	B5

EJB: GAW: ST F.# 735082

> UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

73CR1042

UNITED STATES OF AMERICA

- against -

ISABELIO RIOS also known as Rafael Miranda also known as "Chewy", ELIAS NIEVES and IGNACIO AYALA-DIAZ,

Defendants. 1973

INDICTMENT

Cr. No. (T. 21, U.S.C., §841(a)(1) and §846; T. 18, U.S.C., §2)

THE GRAND JURY CHARGES:

Juan J.

COUNT ONE

On or about the 29th day of November 1973, within the Eastern District of New York, the defendant ISABELIO RIOS also known as Rafael Miranda also known as "Chewy", the defendant ELIAS NIEVES, and the defendant IGNACIO AYALA-DIAZ, did knowingly and intentionally possess with intent to distribute approximately one and one half (1 1/2) ounces of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT TWO

On or about the 29th day of November 1973, within the Eastern District of New York, the defendant ISABELIO RIOS also known as Rafael Miranda also known as "Chewy", the defendant ELIAS NIEVES, and the defendant IGNACIO AYALA-DIAZ, did knowingly and intentionally possess with intent to distribute approximately one (1) ounce of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 13, United States Code, Section 2.)

COUNT THREE

On or about and between the 27th day of November 1973 and the 29th day of November 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendant ISABELIO RIOS also known as Rafael Miranda also known as "Chewy", the defendant ELIAS NIEVES, and the defendant IGNACIO

Cl

UNITED STATES DISTRICT COURS

P. 9 735082

A PLOP A SUSSISSION NO.

19CHIOTS

- 2 -AYALA-DIAZ, did knowingly and intentionally conspire to commit offenses against the United States in violation of Section 841(a)(1), Title 21, United States Code, by conspiring to knowingly and intentionally possess with intent to distribute a quantity of heroin, a Schedula I narcotic drug controlled substance and a quantity of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 846.) A TRUE BILL. FOREMAN. UNITED STATES ATTORNEY EASTERN DISTRICT OF NEW YORK

C2

TPP:GAW:sb F.# 735082 FEB 2 6 1974

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK TIME A.M....

UNITED STATES OF AMERICA

ORDER OF COMMITMENT

- against - :

73 CR 1042

ISABELIO RIOS,

Defendant.

MeDILMED

WHEREAS, the defendant, ISABELIO RIOS, having appeared in the United States District Court for the Eastern District of New York on February 26, 1974 for Trial, on the defendant's motion

IT IS ORDERED that the defendant is committed to Kings County Medical Center pursuant to T-18, U.S.C. Sec. 4244 for a period not to exceed 30 days for study and report as to his mental competence to assist in his defense and as to his mental capacity between November 26, 1973 and January 29, 1973 when the alleged crimes were committed.

IT IS FURTHER ORDERED that the Clerk deliver certified copies of this Order to the U.S. Marshal for the Eastern District of New York.

Dated: Brooklyn, New York February 26, 1974

J.S. DISTRICT JUDGE

DI

9

No	
	TATES DISTRICT COURT District of NEW YORK Division
ISABEL	ITED STATES OF AMERICA vs. IO RIOS, a/k/a Rafeal Miranda Chewy, et al., Defendants.
(T. 21,	NDICTMENT U.S.C., §841(a)(L) 6; T.18, U.S.C., §2)
A true bill	
	open court this
Bail, \$	C3 GPO 902-482

UNITED STALLS DISTRICT COURT

()

TO : Honorable Orrin G. Judd

DATE: March 25, 1974

FROM F. Jacob Mishler, Chief Judge
IN CLERKS OF THE J. M.
U. S. DISTRICT COURTED. M.
SUBJECT: 73-CR-1042 U.S.A. v. Rios
MAR 28 1974

TIME A.M. Assistant U.S. Attorney Woodfield and Mr. Shaw (attorney for defendant Rios) appeared before me today and advised me that you directed them to come before you at 2 p.m. for the purpose of fixing a trial date. Neither expected a trial today. Mr. Woodfield starts a trial before Judge Weinstein tomorrow.

Mr. Shaw advised me that Mr. Rios is charged in the State Court, New York County, with a violation of the Narcotics laws (an A felony). He starts the trial on Thursday, March 28, before Mr. Justice Kirschenbaum. I adjourned the case without date. Mr. Shaw did not object to a two month adjournment and he waived any claim of speedy trial rule violation.

Mr. Shaw had not received a copy of the psychiatric report ordered by you on February 26, 1974 to determine mental competence pursuant to 18 U.S.C.§4244. I directed Mr. Woodfield to give him a xerox copy of the report he had received from you.

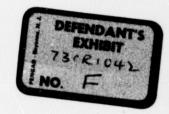
Mr. Shaw suggested that the psychiatric examination should have been conducted by a Spanish speaking psychiatrist and indicated that he might make application before you for a re-examination by a Spanish speaking psychiatrist.

I am herewith re turning the file.

Chief Judge

HEALTH AND HOSPITALS CORPORATION
KINGS COUNTY HOSPITAL CENTER

CLARKSON AVENUE, BROOKLYN, N. Y. 11203



March 13, 1974

Hon. Orrin G. Judd U.S. District Court Eastern District of New York 225 Cadman Plaza E. Brooklyn, New York 11201

Re: Isabelio Rios Criminal Number 73 CR 1042

Dear Judge Judd:

The patient is a 51 year old man who has been indicted before Federal Court for possessing l_2^1 ounces of heroin and one ounce of cocaine on November 29, 1973.

On examination the patient shows no evidence of psychosis or lack of fitness to proceed. He is a middle-aged man who appears somewhat older than his stated age. His English is very limited, and the examination is therefore conducted through an interpreter. The patient is alert, pleasant and cooperative and his statements are always responsive, coherent and relevant, with no evidence of delusions, hallucinations or otherwise disordered thinking. He knows that he is in Kings County Hospital, that he came here from "federal prison on Eleventh Street" via the Federal Court in Brooklyn, and correctly gives today's date, the date of his arrival here and his length of stay. He cannot recall the judge's name. He says he has been represented by a Spanish-speaking, court-appointed attorney named Shaw of 233 Broadway. They have spoken together. "He says he didn't understand me. He says I say one thing now and another thing another time." The patient denies any inconsistency in his statements.

The patient states that he was born in Caguas, Puerto Rico on July 18, 1922 and that he has lived in New York since 1962. He used to live in Brooklyn but recently has been staying with different families around the city. His first marriage, resulting in five children, ended with a separation in 1953. He had four children by a second marriage but this terminated when his wife left with another man in 1969 or 1970. The patient denies any past history of psychiatric hospitalization or treatment. He savs that on January 6, 1973 he entered Greenpoint Hospital for treatment of a bleeding ulcer and was discharged the day of Johnson's death. Despite his treatment, the ulcer pains continued, and in order to gain some relief the patient began using heroin about six months ago. "I was thinking of killing myself, and not to think of that I turned to heroin." The patient used to own two poolrooms but has been unemployed for the past year, living off his savings. He used to keep his money in the Banco De Ponce but because he had gotten word that the bank would be taking money out of the deposits, he removed his money in 1968 and since then has kept it at home. In the latter part of 1973, while in the throes of his pains, the patient would be unable to sleep and

(Continued)

RE: Isabello Rios March 13, 1974 Page 2. would hear footsteps and voices which he thought were calling him. He has had no such symptoms in recent months. He says he took heroin and cocaine three or four times a day via veins on the back of his hands but he cannot estimate the amount. He denies being afraid of anvone at this time. His only previous arrests, he says, were for violations connected with his poolrooms, e.g., selling beer and liquor without a license. In regard to the present charges the patient states, "I was arrested because they have found two pistols in my possession - one was no good - and also because I have used heroin for pains that I have." He gives the date of his present arrest as November 29. When asked if he had heroin in his possession at that time he initially interprets the questions somewhat concretely and responds it was not in his possession. But he then goes on to state, "I had it hidden underneath the bed. They found it underneath the bed. They also found \$8,000. They turned in \$6,000. I don't know what happened to the other two." He admits also having the cocaine, "only a few little rags." The patient insists that he had no intentions of selling the drugs. "What I had wasn't sufficient for that. I didn't have that in mind. It was only for myself." He admits knowing that possession of such drugs was illegal. "I knew it but when you feel sick the way I have, then you are blind to everything else." The patient says he does not know how long a sentence he can possibly receive on those charges. Furthermore, it is his impression that the charges may be killed because the arresting officers had no search warrant. He understands and appreciates the functions of the various principals in a criminal action. "The judge is there to pass sentence after the district attorney has proven you guilty." He knows that a lawyer is there to help him but he complains, "He doesn't help me." Bail has been set, he says, at \$25,000. He sees no reason for psychiatric hospitalization and is eager to return to court. DIAGNOSIS: Drug dependence, heroin and cocaine. CONCLUSION: It is our professional opinion that the defendant does not as a result of mental disease or defect lack the capacity to understand the proceedings against him or to assist in his defense. RECOMMENDATION: Return to Federal Court. Sincerely yours, smil W. howars DANIEL W. SCHWARTZ, M.D. F.A.P.A., Assoc. Professor, Psychiatry, Downstate Medical Center Director, Forensic Psychiatry Service Kings County Hospital Center DWS/rw F2

10290 MA 7/1/1/24

U.S. DISTRICT COURT ED. N.Y.
APR 5 1974
TIME AM. CO.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

NOTICE OF MOTION

73 Cr. 1042

ISABELIO RIOS, et al.,

٧.

Defendant.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of STUART R.

SHAW, dated the 3rd day of April, 1974, the indictment herein, and upon all the proceedings heretofore had herein, the undersigned will move this Court on the 18th day of April, 1974, at the United States Court House, 225 Cadman Plaza East, in the Borough of Brooklyn, City and State of New York at 10:00 o'clock in the fore-noon or as soon thereafter as counsel can be heard for an order requiring a psychiatric examination of defendant by a Spanish speaking doctor, Title 18 United States Code §4244.

Dated: New York, New York April 3, 1974.

yours, etc.

LEAVY, SHAW & HORNE

Aftorneys for Defendant Riose 233 Broadway, Suite 3303 New York, New York 10007

TO: HON. J. ORRIN JUDD
United States District Judge
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11205

Gary Woodfield, Esq.
Assistant United States Attorney

person so served to be the person mentioned and described in said papers as the

tnerein.

UNITED STATES OF AMERICA.

AFFIRMATION

V.

73 Cr. 1042

ISABELIO RIOS, et al.,

Defendant.

STUART R. SHAW, being an attorney duly admitted to practice before the courts of the State of New York, under penalties of perjury, hereby affirms as follows:

- 1. I am a partner in the lawfirm of Leavy, Shaw & Horne, and I have been assigned to represent defendant ISABELIO RIOS pursuant to the Criminal Justice Act.
- 2. I make this affirmation in support of defendant's motion for a reexamination for mental incompetency by a Spanish-speaking doctor.
- 3. Defendant has received such examination previously and it was determined that he was competent to stand trial. However, the examination was conducted with an interpreter as an intermediary between defendant and the examining physician because the defendant is Spanish-speaking.
- 4. It is respectfully submitted that the nature of a psychiatric examination is such that direct communication between the physician and the examined is essential. A translator, however unintentionally, can inaccurately translate idioms and figures of speech or misconstrue remarks of the examined which might be tell-tale to the physician.
- 5. On information and belief, Spanish-speaking psychiatrists are available to perform such examinations in New York, and deponent is preparing a list of several such physicians for the Court's reference.
- 6. This motion is in no way made with the intention of delaying person so served to be the person mentioned and described in said papers as the Sworn to before me, this day of 19 therein.

the proceedings or causing the government undue expense. Since defendant will not be tried until after conclusion of state proceedings against him, there will be no loss of time incurred by re-examining defendant. As for the expense involved, it is regrettable that the first examination took place under the circumstances it did, but affiant believes it is essential to probe defendant's mental competency thoroughly and accurately. Such an examination is possible only with a Spanish-speaking physician.

WHEREFORE, affiant prays an order be entered granting a re-examination of defendant pursuant to Title 18 United States Code §4244 under the auspices of a Spanish-speaking physician and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York April 3, 1974

Stuart R. Shaw

-2-

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

ORDER OF COMMITMENT

- against -

IN CLERK'S OFFICE
S. DISTRICT COURT E.D. N.Y

73 CR 1042

ISABELIO RIOS,

APR 1 9 1974

M'FILMED

Defendant.

TIME A.M.....

Whereas, the defendant, ISABELIO RIOS, having appeared in the United States District Court for the Eastern District of New York on April 18, 1974 and upon the motion of his attorney, Stuart Shaw, Esq., it is

ORDERED that the defendant is committed to Kings

County Medical Center pursuant to Title 18, United States Code,

Section 4244 for a period not to exceed thirty (30) days for

study and report as to his mental competence to assist in his

defense and as to his mental capacity between November 26, 1973

and January 29, 1973 when the alleged crimes were committed. It

is further

ORDERED that said psychiatric examination be conducted by a Spanish-speaking doctor. It is further

ORDERED that the Clerk deliver certified copies of this Order to the United States Marshal for the Eastern District of New York.

Dated: Brooklyn, New York, April 18, 1974

SO ORDERED:

UNITED STATES DESTRICT JUDGE

HI

HEALTH AND HOSPITALS CORPORATION KINGS COUNTY HOSPITAL CENTER

Dy Haud

451 CLARKSON AVENUE, BROOKLYN, N. Y. 11203

May 16, 1974

Hon. Orrin G. Judd U.S. District Court Eastern District of New York 225 Cadmen Plaza Brooklyn, N.y. 11201

Re: Isabellio Rios No. 73 CR 1042

Your Honor:

CHIALCHS C

The above named defendant was admitted to our service on April 23, 1974 pursuant to an order by you that he be examined as to his fitness to proceed and as to his mental capacity at the time of the alleged crimes, the examination to be conducted by a Spanish-speaking doctor.

On April 25th my administrator, Mr. Gover, spoke to you by telephone, informing you that we had no Spanish-speaking psychiatrist on our staff. He suggested to you that the examination be conducted by Dr. Jimenez, a psychiatrist formerly on our staff and presently on the staff of the Bellevue Forensic Psychiatry Service, and your response was to the effect that you would order Dr. Jimenez to go to Kings County Hospital to perform the examination. He subsequently spoke to your secretary, Miss Wasserman, informing her that the examination had still not been performed, and on May 8, 1974 he spoke to your clerk, Miss Sandra Durant, again with the message that no examination had yet been performed. Yesterday I received a telephone call from defense counsel, Mr. Stewart Shaw, who, apparently unaware of Mr. Gover's conversations with you and your staff, asked me if I knew of a Spanish-speaking psychiatrist. I again referred him to Dr. Jimenez.

There are several administrative problems with this case. In the first place it is my understanding that under the arrangements between the Health and Hospitals Corporation and the Federal Courts, the Federal Courts will reimburse Kings County Hospital for only 15 days. For any reimbursement beyond that we have to show that such an extended stay was medically necessary. Mr. Rios has now been here for 23 days and there is no medical grounds for such a lengthy stay.

Secondly, your order asks for an examination as to his mental capacity at the time of the alleged crimes. Such an examination has never been part of our contract with any court, federal or otherwise. I am not familiar with Federal Law but under New York State Law the court cannot even order such an examination. Any psychiatrist performing such an examination must be retained by either the prosecution or the defense.

Thirdly, as noted above, we have no Spanish-speaking psychiatrist on our staff. A telephone call prior to the commitment of Mr. Rios to our service could have avoided this unnecessary hospitalization. May I suggest that in the future, if the court has any unusual stipulations or requests, that it contact us first to ascertain whether or not we can, in fact, comply with the court's request.

Re: Isabellio Rios

May 16, 1974

Page 2.

As regards Mr. Rios, the only Spanish-speaking psychiatrist I know who is interested in seeing such cases is Dr. Jimenez. If he agrees to examine the patient, such an examination can be done most expeditiously by having the patient admitted to Bellevue, where Dr. Jimenez is currently employed.

Sincerely yours,

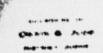
DANIEL W. SCHWARTZ, M., F.A.P.A.
Assoc. Professor, Psychiatry,
Downstate Medical Center

Director, Forensic Psychiatry Service, Kings County Hospital Center

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DWS/rw

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UNITED STATES COURT
EASTERN DISTRICT OF NEW YORK
448 CARMAN PLACE EAST.
BROOKLYN, N. Y. 11801

May 22, 1974

Dr. Daniel W. Schwartz, Director Forensic Psychiatry Service Kings County Hospital Center 451 Clarkson Avenue Brooklyn, N.Y. 11203

> Re: United States v. Isabellio Rice 73-CR-1042

Dear Dr. Schwartz:

I am sorry about the troubles with Mr. Rios described in your letter of May 16.

The fact that there is a hospital like Kings
County Hospital Center in a borough like Brooklyn
with no Spanish speaking psychiatrist is certainly a sad reflection on the city.

However, I will endeavor to do what is necessary with respect to Mr. Rios in other ways.

Yours very truly,

Orrin G. Judd United States District Judge

bcc Judge Platt

RJD:SK:1r F#735,082

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

-against-

ISABELIO RIOS.

ORDER OF COMMITMENT

73 CR 1042

Defendant.

Whereas, the defendant, ISABELIO RIOS, having appeared in the United States District Court for the Eastern District of New York on September 16, 1974 and upon the motion of his attorney, Stuart Shaw, Esq., it is

ORDERED that the defendant is committed to Kings County Medical Center pursuant to Title 18, United States Code, Section 4244 for a period not to exceed forty eight (48) hours for study and report as to his mental competence to assist in his defense.

and report as to his mental competence to assist in his defense. It is further

ORDERED that said psychiatric examination be limited to giving the defendant an electroencephalogram. It is further

ORDERED that a report of said electroencephalogram examination be rendered to the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201 no later than October 18, 1974. It is further

ORDERED that the Clerk deliver certified copies of this Order to the United States Marshal for the Eastern District of New York.

Brooklyn, New York Dated: October 8, 1974

THOMAS C. PLATT

UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF HEW YORK

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK COUNTY OF KINGS EASTERN DISTRICT OF NEW YORK, ss:

being duly sworn, says that he is employed in	
he office of the United States Attorney for the Eastern District of New York. That on	
ne day of, he served a true copy of the annexed	
on the office of	
ttorney for herein, located at	
Borough of, City of New York, by	
leaving a true copy of same with his clerk or other person in charge of said office.	
Sworn to before me this day of	

UNITED STATES DISTRICT COURT Eastern District of New York

UNITED STATES OF AMERICA

-Against-

ISABELIO RIOS,

Defendant.

ORDER OF COMMITMENT

Due service of a copy of the within _____is hereby admitted.

Dated: _____, 19____

Attorney for _____

Steven Kimelman, Ausa 596-3046

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of ______, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

United States Attorney, Attorney for

To:

Attorney for _____

SIR:

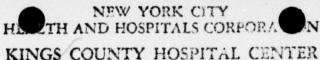
PLEASE TAKE NOTICE that the within is a true copy of _____duly entered here on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

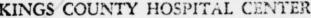
Dated: Brooklyn, New York,

United States Attorney, Attorney for _____

To:

Attorney for _____





451 CLARKSON AVENUE, BROOKLYN, N. Y. 11205



October 9, 1974

Hon. Thomas C. Platt U.S. District Court Eastern District of New York 225 Cadman Plaza E. Brooklyn, New York 11201

Re: Isabelio Rios

Order of Commitment 73 CR 1042

Dear Judge Platt:

This is a 51 year old Puerto Rican male who was sent today from U.S. District Court Eastern District of New York. He was committed to Kings County Medical Center pursuant to Title 18, U.S.C. Section 4244 for study and report as to mental competence to assist in his defense.

The patient is unable to converse in English and Rev Pelipe Nieves was kind enough to volunteer as the interpreter. Rev Nieves advised the examiner that he knew this man from Bible classes that he gives at the Federal House of Detention on West Street, New York City. He describes the patient as "He always appeared rational and coherent to me."

The patient comes to the examination in a willing, cooperative fashion. He looks much older than his 51 years. He carries in his hand ten or more small Bible tracts which he gives to Spanish speaking patients. He appears to be somewhat depressed and his facial expression does not exhibit usual emotional response. His affect is somewhat flattened and constricted. He however responds rapidly to questions that Rev Nieves translates for me. His speech productivity is good, rapid and clear. His responses are coherent and relevant according to the interpreter. The patient denies any delusional thinking, persecutions and mental grandiosity. There are no signs of any thought disorder that is elicited. It appears that the patient's facial expression can be associated with his claim of having "bleeding ulcers that make me sick."

The patient stated that because of feeling sick from his stomach he began to sniff cocaine and heroin but after a while he began injecting it in the veins of his wrist. He spent about \$200 a day on these drugs which he knew were illegal. He supported this habit with \$7,000 that he had saved as well as earnings as an automobile mechanic and the owner of a pool-room on South Fourth Street, Brooklyn, New York.

The patient said that he was arrested because someone told the authorities that he had drugs in his possession. As for the pistols he said "I acted as a pawn broker. Scmebody left the pistols with me to borrow money and was to get them back when he repaid me the loan." He denies wanting to sell the drugs as he

(Continued)

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK COUNTY OF KINGS EASTERN DISTRICT OF NEW YORK, ss:

	being duly sworn, says that he is employed in
	Attorney for the Eastern District of New York. That on
the day of	he served a true copy of the annexed
on t	the office of
attorney for	herein, located at
	, Borough of, City of New York, by
	with his clerk or other person in charge of said office.
Sworn to before me this	
day of	

Ra: Isabelio Rios October 9, 1974 Page 2 said "Someone I knew came everyday and sold me drugs. He also sold drugs to a Federal undercover agent. He was a drug dealer and he was killed. I don't know who killed him." The patient has tatooed in black ink on his right hand the number 13 and the letters R.R. When asked to explain the significance of these marks he said: "13 is my lucky number and R.R. stands for my wife's name she is Rose Rios." The patient has an understanding of the judicial procedures and is aware that the possession of drugs were illegal. DIAGNOSIS: Drug dependence, heroin and cocaine. It is my opinion that the defendant does not as a result of mental diesease or difficulty lack the capacity to understand the proceedings against him and that he has an awareness that the possession of these drugs was wrong, as he previously stated that "they were illegal." It is felt that he can aid and assist counsel in his defense. An order for an Electroencephalogram was made today and the report will be sent to the Hon. Thomas C. Platt, U.S. District Judge for the Eastern District of New York, 225 Cadman Plast E, Brooklyn, New York 11201. RECOMMENDATION: Return to Federal Court. Sincerely yours, RAYMOND M. CHAITIN, M.D. Psychiatrist Kings County Hospital. RMC/1b L2

M. FREILE PLEETWOOD, M. D.

NEW YURK, N. Y. 10021

LEHISH 5-2414

The Psychiatric Examination of Mr. Tsabelia Rios



Psychiatric History and Mental Status

Psychiatric History

Complaint: Mr. Rios complains of insomnis, headache and buzzing of the ears. He worries about his children excessively. He has been hospitalized 3 times for a bleeding stomach ulcer.

History of the Complaint: These symptoms seem to have started when he returned his 4 younger children to their mother.

Pertinent Factors of Family History: Mr. Rios was the oldest child. His father died when he was 11 years old. He started working to support his younger brothers and mother: Mr. Rios said that he was born July 18, 122, which makes him 52 years of age. He was born in Caigues, Puerto Rico. He came to the United States in 1962. He has been in prison since November 29, 1973. He has lived with two different women without marriage and had four children with each of them. Mr. Rios said that the two commen law wives had left him for other men and that he had brought up the eight children. The second wife abandoned him in 1966, and he took care of four children. In 1970 he decided to return the children to his wife, for the daughters sake, because they needed a mother. At the same time he had a bleeding ulcer and he was treated in the Metropolitan Hospital in Brooklyn.

Mental Status:

Appearance, Behavior and Vocal Activity: Mr. Rios is a middle aged, stocky man of medium height. He looks his stated age. He seems calm but he picks his hands and scratches himself. He has three scars on his forehead and his arms are tattooed. His motor activity is slow. He seems to be will coordinated. He seems to be abstracted and preoccupied with his own thoughts, and not related to what is going on around him. The rate of his speech is slow. He does not talk spontaneously and the voice is flat and dull. He answers the questions asked of him. His answers are without affect. He does not stutter or have any speech defects. He yewns all the time.

Mood: Mr. Bios said that he had been very depressed and desperate and he had tried to commit suicide. He cut himself across the chest, and he showed me the scars that the self inflicted wound produced. He was sewn at the etropolitan Hispital. On another occasion he wounded himseld three times with a pick. Presently, he denies any desire to commit suicide. It seems that in the past he has had homicidal tendencie. He has felt so anary that he has wanted to kill. When aske whom did he want to kill he said "himself." He said, "...that this life is such a torture and thinking makes me crazy." He can not sleep at night because it is to quiet. He paces the floor a i goes to the toilet all might long. He can only sleep when there is some a civit around him.

Affect: The national has a flattening of afrect. A expressed enxiety about his children. He said that his 1 year old son is presently at the hospital due to asthma. Mr. Hiss said that worries about the children a 1 the time. The laughters come see him but not very often because it is distressing to them that he is in prison. The patient has a short a tention span but he is able to concentrate. He seems to be drowsy and when he was asked why, he explained because he does not sleep.

Thought Process and Content: There is some lockening of association and scattering. During the interview he withdrew as though howes listening to something. When he was asked what, he said that he hears voices calling him when nobody is calling him. The voices order him to go to one place or another. He also has tactile hallucinations. He has a visual hallucination of a very fat lady who approaches him when he lies in bed.

Orientation He is oriented in time, space and person.

Memory: past and present: Mr. Rios seems to be making a tremendous effort to remember dates. Sometimes he is confused on the years that the children were born. Also, he was not sure if he returned the children to his wife in 1060 or 1970.

Estimate of General Intelligence: Intelligence not tested but it seems to be average.

Diagnoses: Schizophrenia, schizo-affective type, depressed. 295.74 The diagnoses is established by the loosening of the association, the hallucinations and the suicidal attempts, the intense anxiety, and the difficulty the psychiatrist had in establishing contact with the patient. If left alone the patient is not in contact with reality.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ISABELIO RIOS,

NOTICE

73 Cr. 1042

Defendant.

SIR:

PLEASE TAKE NOTICE, that defendant ISABELIO RIOS, based upon phe psychiatrictreport of DR. MARIA RELY FLEETWOOD, dated the day of October, 1974, and upon his well documented record of drug addiction hereby enters a defense of insanity to the instant indictment.

PLEASE PEKE KUHTRER NOTICE, that defendant ISABELIO RIOS concurrently enters a plea of Autrefois convict based on the double jeopardy motion attached hereto.

Dated: New York, New York

31st day of October, 1974

Respectfully yours, STUART R. SHAW/ ESQ. Attorney for Defendant 233 Broadway Suite 3303 New York, New York 10007 BE 3-8991

TO: United States Attorney for the Eastern District of New York 225 Cadman Plaza East Buscklyn, New York

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ISABELIO RIOS.

AFFIRMATION

73 Cr. 1042

Defendant.

STUART R. SHAW, an attorney duly admitted to practice law in the Courts of this State affirms and says under penalties of perjury:

appointed pursuant to the provisions of the Criminal Justice Act, and as such am familiar with the facts herein stated. However, I was not in receipt or privy to my client's case in the New York State Supreme Coutt, his file, etc., until it was partially handed over to my office on October 25, 1974 by his 18-B appointed attorney, Mitchell Horne, Esq.

Indictment \$73 Cr. 1042 charges the defendant together with two others with (1) possession with intent to distribute approximately one and one half (1 1/2) ounces of heroin, a Schedule I narcotic drug controlled substance on or about November 29, 1973; (2) possession with intent to distribute approximately one (1) ounce of cocaine, a Schedule II narcotic drug controlled substance erer about November 29, 1973; and (3) knowingly and intentionally conspiring to commit offenses against the United States, by conspiring to knowingly and intentionally possess with intent to distribute a quantity of

heroin, a Schedule I narcotic drug controlled substance and a quantity of cocaine, a Schedule II narcotic drug controlled substance on or about and between the 27th day of November, 1973 and the 29th day of November, 1973, both dates being approximate and inclusive.

In July of 1974 in the Supreme Court, Special Narcotics Part of the State of New York (Kirschedbaum, J.), the defendant was convicted of all three counts under indictment #N-1834/484/73 (attached hereto as Exhibit A), to wit: (1) acting in concert, on or about November 21, 1973, knowingly and unlawfully sold to a police officer ... a narcotic drug, to wit, heroin, i.e Criminal Sale of a Controlled Substance in the Third Degree; and (2) acting in concert...on or about November 21, 1973, knowingly and unlawfully possessed a narcotic drug, to wit, heroin, with intent to sell the same, i.e. Criminal Possession of a Controlled Substance in the Third Degree; and (3) acting in concert on or about November 21, 1973, knowingly and unlawfully possess a controlled substance, to wit, heroin, i.e. Criminal Possession of a Controlled Substance in the Seventh Degree. Defendant is charged with acting in concert on each of the above charges with two others, one of whom is also named in the Federal indictment above enumerated. (In addition to the aforementioned state indictment on which the defendant was convicted he has also been indicted on substantially identical charges and substantially identically worded indictments except for the time of the alleged overt acts. These indictments are #N-1833-483-73, Attached hereto as Exhibit B; and #N-10-10/74, attached hereto as Exhibit C.

The defendant claims that prosecution of the Federal indictment subjects him to double jeopardy and double punishment and as such the indictment should be dismissed.

The proximity of the dates of the two indictments serves to prove that the agreements which lead to each of the offenses charged are one and the same. It is suggested that the prosecution of the defendant under the Federal indictment for activities alleged to have been conducted on the dates aforementioned has been simply a matter of prosecutorial discretion in that the conspiracy charge of the Rederal indictment must be logically inclusive of the charges in the State indictment. For the nature of a conspiracy is that of an ongoing concern, certainly not confined to a two day period. As such, the agreements, plans, and activities on or about November 21, 1973 in which defendant was involved are the same as those in progress on or about Novembet 27, 1973. The distinction drawn by the Government is, therefore, purely arbitrary.

In light of prior State indictments handed down, it is certainly plausible to believe that the Government's restriction of the offenses to November 27 to November 29, 1973 is purely discretionary and that the Federal indictment could easily have alleged acts which had occured during the same week, only six days prior to the dates so alleged by the Government. The time spans covered in each of the indictments are so similar as to prohibit separate prosecution of the defendant herein.

The State has handed down two indictments other than that upon which the defendant has been convicted. Indictment #N-1833/483/73 and Indictment #N-10-10/74 charge the

defendant with the self-same crimes as the indictment upon which he received a conviction except for the fact that they allege different dates, i.e. November 20, 1973 and August 21, 1973, August 23, 1973 and September 11, 1973 respectively. These charges correspondent substance, to the first two counts of the instant indictment. This procedure on behalf of the Government could conceivebly continue ad infinitum, and should not be permitted. or condoned by this Court.

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It is further held that the substances allegedly sold by the defendant and others on or about November 21, 1973 are identical to those alleged to have been sold on or about November 27, 1978. Said evidence clearly supports the "same offense rule" as enunciated in U.S. v. Kramer, 289 F. 2d 909, (2d Cir. 1961), necessitating the dismissal of the instant indictment. To hold that the alleged activities occuring on or about November 21, 1973 and November 27, 1973 respectively involved different principals, difference sources of their drugs, different means and places of importation, different distribution locations, and different centers of distribution is, in light of the evidence presented, at best questionable in this case.

The Government's case falls in the face of the provisions of the "same evidence rule". As the Court held in U.S. v. Kramer (sic), at page 913:

"the evidence required to support a conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other."

This is directly applicable to the case at bar. The defendant contends that the evidence the Government will use in the Pederal prosecution is identical, or almost identical, to that used against the defendant in the State prosecution in New York State Supreme Court. Further, it is apparent that there are other overt and/or substantive acts which the Government could have presented to the Grand Jury, other than those which it did choose to include in the indictment. As the Court advised in U.S. v. Pacelli, Nos. 1141, 1103, 1165, 1176, September Term, 1973, 2nd Circuit, decided September 23, 1974,: (p. 5502)

... The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice astto this offense constitutes a serious threat to fairness in our administration of justice (emphasis added).

Thus, the Government by its own actions has created a situation in which each and every count of the instant - instant indictment must be dismissed.

Certainly, the identity of the co-defendants in the four indictments serves to show that the alleged acts are substantially the same and are the result of the same agreements and plans. By virtue of the judgment and conviction in the prior State case, it is established that the defendant acted in concert with at least one of the same defendants as in the instant indictment.

If the allegations of both indictments are taken separately, or together, it is clear that the Government asserts that the defendant participated in a general conspiracy to sell narcotic controlled substances. The nature of such a conspiracy is that it is an ongoing concern and it is therefore a rational assumption that the sales and agreements and plans in progress on or about November 21, 1973 were made with the intent of future activities, and can therefore be extended to include those of November 27, 1973 and November 29, 1973, and vice versa. Thus, as the Court held further in U.S. v. Mallah (Pacelli), supra; regarding successive prosecution for activities in furtherance of a conspiracy: (p. 5499)

... The sontitutional provision against double jeopardy is a matter of substance and may not thus be nullified by the mere forms of criminal pleading.

Short v. U.S., 91 F. 2d 614 (4th Cir. 1937).

The fact that one prosecution occured in the State Court and the other in the Federal Court cannot circumvent the guarantee against double jeopardy as provided in the United States Constitution. Justice Black, joined by Justice Douglas and Chief Justice / arren, in Bartkus v. Illinois, 359 U.S. 121 (1959); in their dissenting opinion held:

"If double punishment is what is feared, it hurts no less for

two 'sovereigns' to inflict it than one. . . . The Court... justifies the practice here in the name of 'federalism'. This, it seems to me, is a misuse and desecration of the concept. . . I have been shown nothing in the history of cur Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments."

We concur in this opinion and hold that prosecution of the defendant by the Federal Government in this case is a violation of defendant's constitutional guarantees, a violation that can only be rectified by the dismissal of the indictment herein.

The Government may rely on Bartkus, supra in opposition to this motion. However, Justice Brennan, in a separate dissent therein, suggested that the opinions of the Court had not fucused adequately on the determinative question, i.e.: "how much the federal authorities must participate in a state prosecution before it so infects the conviction that we must set it aside." Defendant contends that the instant indictment is a direct result of Joint Task Force activities and that the instant prosecution is the result of the coelective workings of the office of Frank Rogers, Special Narcotics Prosecutor, and the United States Attorney's office for the Eastern District of New York. (We ask the Court to take judicial notice of the fact that these two agencies work hand in hand on many narcotics cases). As such, the instant prosecution is incurably tainted and must be dismissed.

In fact, the entire purpose of the indictment in the Federal Court is to improve the track record and conviction

rate of the United States Attorney's Office in the Eastern
District and to harrass a man who has already been convicted
in State Court and who faces a term of life imprisonment. The
Assistant United States Attorney further knows that the defendant
will be virtually precluded from taking the stand in light of
the readiness with which his testimony will be impeached considering his previous conviction. Such tactics are reprehensible,
and odiferous of a type of practice and professional conduct not
usually found or expected in the Federal Court and beneath the
demeanor of the United States Attorney's Office in the Eastern
District which has pretmously maintained an exemplary record in
this regard. Such activity cannot be condoned by this Court
any longer and should be terminated specifically with the
instant case.

Counsel further notes that it was his understanding

Counsel further notes that it was his understanding after conferring with the initial United States Attorney assigned to this case (and there have been a total of five Assistants assigned herein) that this case would be nollied by the United States Attorney if a conviction was obtained in the State prosecution, which it was.

As the Court held in U.S.A. v. Jorn, 400 U.S. 480 (1971):

"The Fifth Amendment's prohibition against placing a defendant 'twice in peopardy' presents a constitutional policy of finality for the defendant's benefit in Federal criminal proceedings. A power in

Government to subject the individual' to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both of these considerations are expressed in Green v. United States, 355 U.S. 184, 187-188 (1957), where the Court hoted that the policy underlying this provision 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' These considerations have led this Court to conclude that a defendant is placed in double jeopardy in a criminal proceeding once a defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. See Green v, U.S., supra at 188; Wade v. Bunter, 336 U.S. 684, 688 (1949). (400 U.S. at 479) .

The continued harassment and prosecution of a man already convicted and facing up to life imprisonment serves no purpose in protecting society and only costs the taxpayers more money for expensive prosecution and burdens the Court and the United States Attorney with an even heavier case load than they already carry. The Government's interests in upholding the law have been vindicated by the previous conviction. The instant prosecution serves only to harass or to scare or to intimidate and serves no positive purpose whatsoever.

It is violative of defendant's constitutional rights and quarantees in all of the above enumerated ways and it deptives the defendant of his rights to due process of law.

WHEREFORE, it is respectfully requested that

the indictment herein be dismissed.

Dated: New York, New York 31st day of October, 1974

If Stuart R. Shaw

No. INA

THE FEOPLE OF THE STATE OF NEW YORK

- against -TONDOLO MIOS E/1/2 JOH DOD GIVY and IGNACIO AYALA-DIAZ a/1:/a JCIN DON PONCHO.

Defendants.

N-1834 /454 /73

, 1973 Filed 2712 day of DEC

Pleads NOT GUILTY 1/29/74

Coursel MITCHELL HORN

Hail 25,000

LAI FEDERAL CUSTEDY WEST ST.

DIDICTHENT

CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE

CREMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE

Fenal Lew 8 220.39, 220.16, 220.03

FRANK J. ROGERS Special Assistant District Attorney

A TRUE BILL

SPECIAL NARCOTICS COURTS SUPREME COURT OF THE STATE OF NEW YORK CITY OF NEW YORK COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK -against-

TOWNSHO RIOS a/k/a JCH DOS CHENY and IGUACIO AYALA-DIAZ a/k/a JOHU DOD rollello, Defendants.

THE GRAND JURY OF THE SPECIAL NARCOTICS COURTS OF THE CITY OF NEW YORK, by this indictment, accuse the defendants of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed 44 follows:

The defendants , in the county of Mingo City of New York, on or about Movember 21, 1973 knowingly and unlawfully sold to a police officer known to the Grand Jury a narcotic drug, to wit, heroin.

SECOND COUNT: AND THE WAND JURY AFORESALD, by this indictment, further accuse said defendants of the crime of CRDWINAL POSSESSION OF A CONTROLLED SUB-STANCE IN THE THIRD DEGRME, committed as follows:

Said defendents /in the county of Hings City of New York, on or about November 21, 1973

knowingly and unlawfully possessed a narcotic drug, to wit, heroin with intent to sell the same.

THIRD COUNT: AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUE STANCE IN THE SEVENTH DEGREE, committed as follows:

acting in concert Said defendants /in the county of hings

City of New York, on or about november 21, 1973 knowingly and unlawfully possessed a controlled substance, to wit, heroin.

> FRANK J. ROGERS Special Assistant District Attorney

Counsel

day of

Filed

Pleads

Hail

No. INA N-1833/483/73

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ISABELO, RICO, a/k/a JOHN DOE CHENY

Defendant.

LIDICIMENT

CRIMINAI POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE CRIMINAI POSSESSION OF A CONTROLLED SUBSTANCE IN THE CRIMINAL SALE OF A COMPROLLED SUBSTANCE IN THE THIRD DEGREE THIRD DEGREE

Penal Lew 8 220.39, 220.16, 220.03

FRANK J. ROGERS Special Assistant District Attorney

A TRUE BILL

Foreman

THE PEOPLE OF THE STATE OF NEW YORK
-sgainst-

ISABELO RIOS a/k/a JOHN DOE CHEWY

Defendant

THE GRAND JURY OF THE SPECIAL NARCOTICS COURTS OF THE CITY OF NEW YORK, by this indictment, accuse the defendant of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed follows:

The defendant , in the county of Mings
City of New York, on or about Movember 20, 1973
knowingly and unlawfully sold to a police officer
known to the Grand Jury a narcotic drug, to wit, heroin.
SECOND COUNT:

----X

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of CRIMINAL POSSESSION OF A COMPROLLED SUFSTANCE IN THE THIRD DEGREE, committed as follows:

Said defendant in the county of Mings
City of New York, on or about Movember 20, 1973
knowingly and unlawfully possessed a narcotic drug, to wit, herein with intent to sell the same.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accurate said defendant of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUF-STANCE IN THE SEVENTH DEGREE, committed as follows:

Said defendant in the county of Kings
City of New York, on or about Movember 20, 1973
knowingly and unlawfully possessed a controlled substance, to wit, heroin.

FRANK J. ROGERS
Special Assistant District Attorney

Counsel MITCHILL HORN

THE PEOPLE OF THE STATE OF NEW YORK

4 day of JAN , 1974

Filed

- against -

Pleads NOT GUILTY 1/29/74

ISABELLO RIOS,

Bail 50,000

Defendant.

INDICTMENT

CRIFINALLY SELLING A DANGEROUS DEUG CRIMINAL POSSERSION OF A CONTROLLED SELSTENCE IN THE THERE DUCKEE SUBSTANCE IN THE SECOND DEGREE CLIMENT SATE OF V COMMISSIED CHIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DUGBER CRIMINAL POSSESSION OF A DANGEROUS STREETHER IN THE SIXES DEGREE DIUG IN THE FOURTH DEGREE CULRINAL POSSESCION OF A COMPROLLED CULTULE SALE OF A COMPROLLED CHENTEL POSSESSION OF A COUVEOURD SUBSTANCE IN THE SEVENTE ENGINEE

Penel Law 95220.35,220.15,220.05,220.41,220.16,220.09,220.39,220.03

FRANK J. ROGERS
Special Assistant District Attorney

A THUE BILL

Foreman

SPECIAL NARCOTICS COURTS
SUPREME COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against

Defendant.

THE GRAND JURY OF THE SPECIAL NARCOTICS COURTS OF THE CITY

OF NEW YORK, by this indictment, accuse the defendant (X) of the crime

of CRIMINALLY SELLING A DANGEROUS DRUG IN THE THIRD DEGREE, committed as

follows:

The Defendant (g) in the county (county sounds) of Kings, City of New York

on or about August 21, 1973

knowingly and unlawfully sold to o. police officer known to the Gr Jury a narcotic drug, to wit, heroin.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of CRIMINAL POSSESSION OF A LANGEROUS DRUG IN THE FOURTH DEGREE, committed as follows:

Said defendant XXX in the county XXXXXXXXXX of Kings.
City of New York,

on or about August 2], 1973

knowingly and unlawfully possessed a narcotic drug, to wit, Hercin with intent to sell the same.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of CRIMINAL POSSESSION OF A DEGENOUS DRUG IN THE FOURTH PEGREE, committed as follows:

on or about August 21, 1973,

knowingly and unlawfully possessed a NArcotic drug, consisting of or and more preparations, compounds, mixtures and substames of an aggregate weight of one-eighth ounce and more containing the respective alkaloids or salts of heroin.

FOURTH COUNT:

AND THE GRAND JURY AFORESAID, oy this indictment, further accuse said defendant of the crime of CRIMINALLY SELLING A DANGEROUS DRUG IN THE THIRD DEGREE, committed as follows:

The defendant x (x) xin the county (xxxxxxxx) of Kings,

City of New York

on or about August 23, 1973

knowingly and unlawfullygave to a police officer known to grand a narcotic drug, to wit, heroin.

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of CRIMINAL POSSESSION OF A DANGER DRUG IN THE FOURTH DEGREE, committed as follows:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of CRIMINAL POSSESSION OF A DANGER DRUG IN THE SIXTH DEGREE, committed as follows:

Said defendant (3) in the county (MANKING) of Kings,

City of New York

on or about August 23, 1973

knowingly and unlawfully possessed a dangerous drug, to wit, heroin.

GPO - 1972 O - 474-479

SEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, furthed accuse said defendant of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE, committed as follows:

Said defendant, in the county of Kings, City of New York on or about September 11, 1973, knowingly and unlawfully sold to a police officer known to the Grand Jury one or more preparations, compounds, mixtures and substances of an aggregateight of one-eighth ounce and more containing a narcotic drug to wit, heroin.

EIGHTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further couse said defendant of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows

Said defendant, in the County of Kings, City of New York on or about September 11, 1973, knowingly and unlawfully cossessed a narcotic drug, to wit, heroin, with intent to sell the same.

INTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE, committed as followed by said defendant, in the county of Kings, City of New York on or about September 11, 1973, knowingly and unlawfully possessed one or more preparations, compounds, mixtures and substances of an aggregate weight of one-eighth ounce and more containing a narcotic drug, to wit, heroin.

AND THE GRAND JURY AFORESAID, by this indictment, further accounted defendant of the crime of CRIMENAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

Said defendant , in the county of Kings
City of New York, on or about September 11, 1973
knowingly and unlawfully sold to a police officer
known to the Grand Jury a narcotic drug, to wit, heroin.
ELEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further act said defendant of the crime of CRIMINAL POSSESSION OF A CONTROLLED STANCE IN THE THIRD DEGREE, committed as follows:

Said defendant in the county of Kings,
City of New York, on or about September 11, 1973
kmowingly and unlawfully possessed a narcotic drug, to wit, heroin
with intent to sell the same.

TWELFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further a said defendant of the crime of CRIMINAL POSSESSION OF A CONTROLLED STANCE IN THE SEVENTH DEGREE, committed as follows:

Said defendant , in the county of Kings
City of New York, on or about September 11,/knowingly and unlawf
possessed a controlled substance, to wit heroin.

FRANK J. RCGERS
Special Assistant District Attorney

UNITED STATES GOVERNMENT

Memorandum

TO

Benjamin F. Butler U.S. Marshal, EDN'

FROM

:Warrant Squad

Eastern/New York

odriguez aka 'Willie' aka William Gonzalez

On 12/6/74 in the afternoon, Deputy U.S. Marshals David O'Flaherty and Ronald Ehnes interviewed various people in the area of 198 South 1st Street. Brooklyn, trying to locate the above named individual.

Mr. and Mrs. Antonio Rodriguez, superintendant of 198 South 1st Street. stated that the above named subject had not lived at this address for approximately 4 years. They also stated that the subject had moved back to Puerto Rico, whereabouts unknown.

DEPARTMENT OF JUSTICE

73CR1042

DATE: 12/12/74

The current residents of Mr. Bobby Rodriguez's apartment area Mr. and Mrs. Ralph Pardro. Mrs. Evone Pardro was interviewed and she stated that she has lived at this address for 4 months. Mrs. Pardro also showed to us a letter that was addressed to Mr. Bobby Rodriguez, which had been there for approximately 1 month. The letter was from the Department of Motor Vehicles, notifying Mr. Rodriguez that his license had been revoked.

Mr. Hoctor Cruz, owner of the Nati Grocery Store across the street from 198 South 1st Street, was also shown the photo of the above named subject, but failed to identify the subject.

Miss Iris Martinez, 258 Grand Avenue, Brooklyn, was leaving the Nati Grocery Store, and was asked by the writer if she knew the above named subject. Miss Martinez stated that she "never saw the man before in her life".

A Postal check was requested on 12/9/74, and information received on 12/10/74 revealed that a removal had been placed on the above named subject, requesting that his mail be sent to 19 Ten Eyck Street, Brooklyn. Investigation revealed that no one by the name of Mr. Bobby Rodriguez or other names used by the above named subject, lived at that address.

Mr. Juan Ruiz, tenant at 19 Ten Eyck Street, stated that he "never saw" the above named subject. A check of the local area could not produce anyone who was able to identify the subject. Investigation also revealed that there is also a'Ten Eyck Walk" which is approximately one block from Ten Eyck Street. Investigation revealed that there is no such address as 19 Ten Eyck Walk. Ten Eyck Walk is a New York Housing Project, but there is no number "19".

Investigation closed 12/11/74.

David O'Flaherty Do'F Warrant Squad Eastern/New York

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CHARGE OF THE COURT

THE COURT: Mr. Katzberg, Mr. Shaw, Mr. Rios, Mr. Burgoes and ladies and gentlemen of the jury:

We are now approaching the end of the case.

You have heard the evidence. You have heard the arguments of counsel and it is my duty to give you the instructions on the law that apply to the case.

I use written notes from various sources so as to be as accurate as possible so if I can repeat anything, I can say the same thing the second time.

What I do in the charge is describe the general principles of law that apply to all criminal trials, then the nature of the charges in this case and the specific rules of law that apply to those charges, something about how to evaluate evidence, and finally something about how you should reach your verdict.

In our adversary system of criminal justice, it is the duty of the prosecutor to do his best to present the Government's case and of defense counsel to do his best to represent his client's interest.

It is my job to enforce the rules of evidence and announce the rules of law. It is the Jury's job to decide the truth or falsity of the testimony

and the inferences to be drawn from the testimony.

It is your duty as jurors to follow the law as I've stated it and employ those rules of law to the facts as you find them from the evidence in the case.

You are the sole judges of the facts. You are to perform your duty without bias or prejudice, for or against any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion.

The law presumes that a defendant is innocent of crime and the law permits nothing but legal evidence presented before a jury to be considered in support of a charge against the accused. The presumption of innocence is enough in itself to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the guilt of the defendant on a particular count from all the evidence in the case.

The presumption continues right up to the time you decide the case and the Government has the burden of proof at all times.

P6

said that we should let the words speak for themselves
A reasonable doubt is a fair doubt based on reason
and common sense, arising from the state of the evidence or from the absence of evidence.

A reasonable doubt does not mean a doubt that a juror asserts arbitrarily or capriciously because he wants to avoid an unpleasant task. It does not mean a possible doubt. It is tarely possible to prove anything to an absolute certainty and the law does not require this.

What is frequently said by the courts is that proof beyond a reasonable doubt refers to the kind of doubt that would make you hesitate to act in your own important affairs.

This rule of proof beyond a reasonable doubt operates on the whole case. It does not mean that each bit of evidence must be proved beyond a reasonable doubt. It means that the sum total of the Government's evidence must satisfy you beyond a reasonable doubt as to each element of the crime charged or else you must acquit.

If you are so satisfied, then you must convict.

Finding a person to be guilty of a felony and subjecting him to criminal penalties is a serious

matter. You have a right to consider this fact in deciding whether you have a reasonable doubt.

Nevertheless, if you are convinced beyond a reasonable doubt of the defendant's guilt, you must find him guilty and not be swayed by sympathy.

An indictment, as I have said before, is just a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and the fact that a Grand Jury voted the indictment does not create any presumption or permit any inference of guilt.

The defendant has pleaded not guilty and the indictment and the plea create the issues which you must decide.

As I said at the beginning, the law never imposes a duty on a defendant in a criminal case to testify or produce any evidence. A defendant may present himself as a witness, as Mr. Rios did in this case and then he becomes subject to cross-examination as you have seen and you are to judge his credibility under the same rules that apply to all witnesses.

You may consider that a defendant has a strong motive to lie to protect himself, but you should also

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Charge

consider that he takes a real risk in subjecting himself to cross-examination and that sometimes no one else can tell his story better or refute the prosecution's testimony more effectively.

You have to decide whether to believe the defendant or how much of his story to believe.

The indictment in this case is in two counts:

One charging possession with intent to distribute

heroin and the other cocaine.

November, 1973, within the Eastern District of
New York, which includes Brooklyn, the defendant
Isabelio Rios, also known as Rafael Miranda, also
known as "Chewy", the defendant Elias Nieves and
the defendant Isnacio Ayala Diaz, did knowingly and
intentionally possess with intent to distribute,
approximately one and one-half ounces of heroin,
a Schedule I narcotic drug controlled substance which
is charged as a violation of 21 U.S. Code Section
841(a)1, and 18 U.S. Code Section 2."

Count Two charges: "On or about the same day, within the Eastern District of New York, the defendant did knowingly and intentionally possess with intent to distribute, approximately one ounce of

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cocaine, a Schedule II narcotic drug controlled substance."

Each count charges a separate violation of the Drug Abuse Prevention and Control Act. The Section provides that ! Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance."

Controlled substances are defined in Section 812 of Title 21 of the United States Code. Heroin is specifically listed as one of the opium derivatives which is a controlled substance under Schedule I of that Section.

Schedule II lists coca leaves and any salt, compound, derivative or preparation of coca leaves. That would include cocaine.

The statute refers to distributing but it also defines distributing by stating: "The term distribute means to deliver other than by administering or dispensing a controlled substance." So it is not confined to a man who goes out on the street and sells drugs to a lot of people. It applies also to somebody who hands narcotic substances to somebody else, the

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delivery is itself a distribution.

I am not going to tell you the range of penalties for the offense because that is for me to determine if there is a finding of guilt. And similarly, it is not for you to consider what the relation will be between the State penalty if his State conviction is affirmed and any penalty imposed here or whether, if you should find him not guilty because of lack of criminal responsibility, whether he would be confined in some institution.

Those are all matters for the judge to determine after the verdict comes in.

I read specific amounts referred to in the imlictment but all that is necessary is that the Government show approximately those amounts. It is sufficient if the Government establishes a quantity substantially similar which may be more or less than that charged which is close enough so that the defendant knew what he was facing when the indictment was presented to him and he pleaded to it.

The statute requires that the sale or distribution be made knowingly or intentionally.

An act is done knowingly if it is done voluntarily and not because of mistake or accident or other

Charge

reason. A transaction is not intentional unless it is done knowingly, so the two words knowingly or intentionally can really be considered together.

There are really four essential elements of the offense in each count of the indictment:

First is possession of heroin in Count One or cocaine in Count Two.

Second is the intent to distribute.

Third is that this be done knowingly or intentionally and in this case the -

Fourth issue is -- the fourth element, capacity for criminal conduct.

Possession is not restricted to having something in your hands or in your pocket. The law
recognizes two kinds of possession, actual possession
and constructive possession.

A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who although not in actual possession knowingly has both the power and the dominion at a given time to exercise dominion or control over a thing, either directly or through another person or persons then in constructive possession of it.

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Charge

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole.

If two or more persons share, actual or constructive possession is joint.

You may find the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

You may find actual possession with respect to the cocaine iff you find there was a package of cocaine in Mr. Rios' pocket.

You can find constructive possession of the heroin if he told Mr. Diaz what to do and he can control it.

Simiarly, with respect to the material that was in the front bedroom, in the so-called trap, if Mr. Rios had access to it, and knew about it, had the power to control the disposition of it, you could find constructive possession of that, also.

With respect to the intent to distribute, you can infer intent from the amount involved if you

Charge

decide with respect to the cocaine or the heroin there was more than Mr. Rios wanted for his own use.

You can also infer intent from the negotiaions for the sale if you believe that Mr. Rios had negotiated with Agent Cordero to actually sell the heroin and you can also consider the negotiations, the sale, that the Police Officer Messina said had been made earlier in the month.

You cannot punish him for the transaction of Messina. You can consider it only as bearing on the intent with which he possessed the heroin or the cocaine if you find that he possessed it.

If the heroin or the other instruments that were involved here belonged to somebody else who used the apartment, then you may be able to find that the defendant knew nothing about them, that he should not be charged with them, but the indictment mentions Section 2 of Title 18, which says:

"Whoever commits an offense against the
United States or aids, abets, counsels, commands,
induces or procures its commission is punishable as a
principal."

So if you think some of these other people in the apartment were the ones who were negotiating sales

Charge

and that Mr. Rios was just helping them, the statute applies even if he was just aiding and abetting in somebody else's sale, knowingly and intentionally and with the capacity for criminal conduct.

You have heard a lot of talk in the case about an insanity defense. Actually, it is an anachronism, that it is an insanity issue.

sanity as well as the other elements of the crime.

The law does not hold a person criminally accountable for his conduct while insane since an insane person is not capable of forming the intent essential for a crime. Therefore, under the defendant's plea of not guilty, there is an issue concerning his mental capacity at the time of the alleged offense.

Even the word "insane" is an inaccurate shorthand phrase, left over from my generation or my parents' generation.

The rule as applied by the courts today is that a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity, either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the

law.

I will repeat that the question on mental capacity is whether the defendant lacks substantial capacity, either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

In considering the mental condition of the defendant at the time of the alleged offense, you may consider evidence of his mental state, both before and after that time. It is not decisive but it may help in drawing inferences.

The material issue, though, is whether at the time of the alleged crime the defendant lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

able doubt as to whether the defendant was sane within that definition at the time of the alleged offense, you should find him not guilty even though it may appear that he was sane at earlier or later times and occasions within the definition I have given you.

On the contrary, if you are satisfied beyond a reasonable doubt that the defendant had the mental

capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law, then you must find him guilty.

And in considering the mental state of the accused, you should also bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Mental capacity bears on the second element, the -- the third element, knowingly and intentionally, but you must consider that as a separate element, whether he was knowingly and intentionally in possession of the cocaine or the heroin with the intent to distribute.

In dealing with this issue of mental capacity, you could consider all the evidence presented, not just the expert testimony, but also the facts inthe case as you have heard them as they bear on your judgment with respect to the defendant's mental capacity.

The burden rests onthe Government throughout the trial. It never shifts to the defendant. The Government must prove each of the elements of the crime beyond a reasonable doubt. If you have a

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reasonable doubt as to any element, you must acquit
just as you have a duty to convict if you are persuaded
beyond a reasonable doubt.

Now, with respect to evaluating evidence, generally speaking, there are two types of evidence that we describe from which a jury can find the truth of the facts in a case:

One is direct evidence, like the testimony of an eyewitness. The other is indirect or circumstantial evidence which is the proof of a chain of circumstances logically pointing to the existence or non-existence of certain facts.

Here, the Government, for instance, would say that the money in the front room was an indication that, circumstantial evidence, the defendant was a dealer and not just supporting a habit with the money that he earned from his automobile work, that he was not buying from people who happened in with drugs.

On the other hand, the defendant says the fact the money and so many of the other things were in the front bedroom, which is his son's bedroom, would support the inference that Mr. Rios did not have access to them, did not know about them, should

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not be charged with their possession.

You are to decide the proper inference to draw. As a general rule, the law makes no distinction between direct and circumstantial evidence. Circumstantial evidence to establish guilt need not exclude ever reasonable hypothesis of innocence.

It is only necessary that the jury be satisfied of the defendant's guilt beyond a reasonable doubt on the basis of all the evidence in the case, both direct and circumstantial.

Circumstantial evidence alone may be enough to convict if you find the defendant guilty beyond a reasonable doubt on the whole case.

When you analyze the evidence, you can draw reasonable inferences based upon your own common sense and general experience but only from the facts that you find were proved. You do not leave your common sense behind when you go into the jury room, but you are not confined to the bare bones of the testimony.

You cannot act on conjecture or guesswork. have to decide on reasonable inferences that you find were proved.

Now, we come to the credibility of witnesses and

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that is a difficult job and one that the law permits the twelve impartial ordinary citizens, more trustworth and more impartial than a judge would be.

In weighing the testimony of various witnesses, you can consider the relationship of the witness to the Government, the bias or interest of the witness in the outcome of the case, the manner of the witness while testifying, their candor and intelligence as you have observed them.

You should consider the extent to which any testimony has been confirmed or contradicted by other credible evidence. You look at inconsistencies within the testimony of any witness on direct examination, cross-examination, whether any witness has changed his testimony.

If you find that a witness has lied, you can say you will not believe anything the witness said or you can say part of what he said was true and part was not. And you will pick it out.

Similarly, with inconsistencies, within the testimony of a witness or between the testimony of witnesses, you may disregard such testimony in whole or in part but you should bear in mind that a witness may have been mistaken or untruthful with respect to

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part of his or her testimony and correct and truthful with respect to other parts.

Inconsistencies may relate to either a detail
that is unimportant or an important part of the
testimony. You are to determine that and evaluate
the testimony accordingly. You can reflect on your
own experience as to the extent to which repetition
of the same event by two different people or by
somebody that repeats it twice may vary in detail
or whether the variations mean the witness is inventing
a story or that there are innocent inaccuracies.

Mainly, the Government case came out of Government agents. You are not to give any greater weight to the testimony of a witness solely because he is paid by the Government or by the State. His testimony is to be evaluated in the same manner in which you would evaluate the testimony of other witnesses with no plus and no minus.

You must also evaluate the testimony of the defendant and you may consider his deep personal interest in the case. I have discussed that before and I need not repeat it.

There is a rule that if a party fails to produce a witness who is available to him, the jury

favorable to that party. Here there has been a lot of talk about Bobby Rodriguez, a Government informant, sometimes known as Willie. You have heard that the Government has been unable to locate him. If you find that Rodrigues was not available as a witness to either the Government or the defense or that he was equally available to both sides, you may not speculate as to how he might have testified and you may draw no inference either for or against the Government or the defendant by virtue of his absence as a witness.

So if you find that the Government made a reasonable good faith attempt to find him, that neither the Government nor the defendant can find him, you decide the case on the evidence that is here.

You do not do any guesswork as to what Bobby Rodriguez might have said.

Again, there is a rule it is not necessary

for either side, particularly not necessary for the

Government, to produce any specific number of witnesses.

You can decide a case on the testimony of one witness

if that helps you reach a determination of guilt

beyond a reasonable doubt.

Of course, you do not decide the case on the

number of witnesses or the number of exhibits. The Government did have more witnesses, but your decision depends upon the quality of the testimony and the credibility of the witnesses, not on the number of witnesses or the length of their testimony.

I mentioned at the beginning, and I repeat, you are not to be influenced by the fact that there were objections to some questions or some items of evidence. You are not to try to guess what the answer would have been to a question that was ruled out or exhibits that I would not receive and you are to disregard any evidence that I struck out.

We heard testimony of doctors who were permitted to testify as expert witnesses. Generally, a witness i- supposed to testify as to what he saw or knows or heard and not to his opinion. We do permit qualified experts to give opinions but you are not by any means limited in considering the question of mental capacity to the opinions of three doctors.

As a matter of fact, you do not have to accept expert testimony at all. You can disregard it and decide it on your own if you think it is not credible.

You are entitled to take into account, in any

event, and you should take into account any other

evidence that you believe relates to the issue of

mental capability including the evidence which you

previously considered on the issue of whether the

defendant's conduct was wilfull, knowing and inten
tional.

A Judge in a Federal court has a right to comment on the evidence, but I am not going to do so because you have heard it rather fully very recently by counsel on both sides and I do not think I need to marshal it.

I think it is fresh, relatively fresh in your minds. If I have said something about it, as I have, in my discussion of the law, and to the extent that Government counsel and defense counsel have said anything about it, your recollection governs and not what any of us have said.

You are the judges of the facts. Anything I have said, I have not intended to indicate any opinion as to guilt or innocence. That is entirely for you to decide.

Now, a few words about reaching a verdict.

Your verdict must be unanimous on each count. That
means you must all agree. It is wise to discuss the

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partisans or advocates. In that way you are making a high contribution to the administration of justice. You should report a verdict on both counts. You can find Mr. Rios guilty on one count and not guilty on the other or guilty on both counts or not guilty on both counts.

When you have reached a verdict, the Foreman should simply give the marshal who will be sitting outside the door a note saying you have reached a verdict. Then, when you are in court, Mr. Burgoes will report the verdict orally.

polled, to ask each juror whether he or she agrees with the verdict so we are sure it is unanimous.

Again, in determining guilt or innocence of the defendant, you should not give any consideration to the matter of punishment or the fate of the defendant if he is found not guilty. This question is exclusively the responsibility of the Judge at the conclusion of the case.

You are each entitled to your own opinions but you should exchange views with your fellow jurors and listen carefully to each other. No one should

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hesitate to change an opinion if he is convinced that someone else had a better view of it. But no one has to give in even to a majority. Your decisions must be your own.

We are now close to 3:00 o'clock. If you have not reached a verdict by 5:00, suppose you decide whether you want to stay on or whether you want to be excused and come back tomorrow. I will consider it and then bring you in.

We are now at a sort of anti-climax because after I finish my instructions to the jury, both counsel have a right to tell me out of your presence whether I said anything wrong or left anything out.

I may call you back or I may just send word in for you to go ahead with your deliberations.

I am going to assume that you will not be called back, so I will wind up with these words:

Your oath sums up your duty, that is: Without fear or favor to any man you will well and truly try the issue between these parties according to the evidence given to you in court and the laws of the United States.

Now, I will ask the Clerk to swear the marshal to be with your during deliberations.

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(Whereupon two marshals were duly sworn by the Clerk of the Court.)

THE COURT: The two alternates are not needed.

I have shorter trials where we did need the alternates.

I appreciate your being here.

Mr. Giokas will give you your cards. Do not talk to the jurors. You may go out now.

The rest of the jurors can follow the marshals into the juryroom.

Thank you for your attention.

(Jury leaves courtroom.)

THE COURT: Mr. Katzberg, any exceptions?

MR. KATZBERG: Just one comment, your Honor, with reference to a comment I thought you had made during the course of the Charge. That is that the jury is not to consider what happened to the two co-defendants named in the indictment.

I recall, your Honor, in reading that indictment to them mentioned the other two individuals. I think that it is entirely appropriate, warranted that they be told that what happened to the two co-defendants not be considered by them, that they only consider the guilty of this defendant.

THE COURT: Maybe so. I am not sure whether

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appeal so as to preserve the defendant's rights.

MR. SHAW: I'll go downstairs right after today and I'll file the notice, because I feel I have an obligation because to my mind, as I said before, I still question the man's sanity. He may perfectly be sound, as the jury found --

THE COURT: There are degrees of sanity. He may have some lesser concept than what the foreman has, and still be within the area of criminal responsibility. That's why I still recommend psychiatric treatment when he gets into federal custody again.

The Influence of Language Upon Symptomatology in Foreign-Born Patients

BY JULIO C. DEL CASTILLO, M.D.

Puring my extended and rather intensive experience in the foreuse unit of the New Jersey State Hospital at Frenton, working with the "criminal insane" in both male and remale sections of that division. I have no served on many occasions that patients of foreign extraction, mainly Spanish-speaking pear obviously psychotic during the interview with the psychiatrist held in their mother tonene but seem much less so, and even may not show any overl psychola.

symptoms at all, if the interview is conducted in English. This is corroborated during their presentation to the staff, which is also held in this language, or when interviewed individually in English. I advised my colleagues about this observation and gave flaem evidence to support it. They listened with solicitude and interest but after further observation they found that the patients showed no or only slight psychotic behavior.

I would like to give a few hints about my own views on the phenomenon, repeating that no attempt is made in this brief article to establish a formal hypothesis or to develop a definite theory.

who thinks and dreams in his own language will it he becomes psychotic distort reality in his own native thoughts and language; that he may associate freely, being dominated by his unconscious mind and not disturbed while talking in his mother tengue. A language not his own, in which he has to make an effort to understand and to tespond, can act as a stimulus that shakes have up, in they have been upon and puts him in hence course twith reality.

the should also be noted in this connection that "normal" foreign people swear in their native tongue, as they wish to relieve their anconscious of their anger and frustrations. The writer can attest to this observation from his own personal experience.

There follow several clinical cases that show typical patterns that may serve as examples.

Amer. J. Psychiat. 127:2, August 1970

Case Reports

Case 1. J.S. was a 30-year-old Puerto Rican male patient charged with murder. At the beginning of his hospitalization he was obviously psychotic in both English and Spanish. During his hospitalization, which lasted several months, he received intensive and active psychiatric care, including a series of 29 electrotherapy treatments. By the end of his hospitalization he was examined by an outside expert, a renowned English-speaking psychiatrist, who found him able to stand trial

The patient then had a sanity hearing. I was there as an expert witness. At the hearing it was obvious that when questioned by the prosecutor, the lawyer, and the judge, the patient was coherent and relevant, giving proper answers to the questions. Before, during, and after the trial I spoke with my patient in Spanish, and whenever his delusions were touched upon he showed signs of severe mental disorganization, unsystematized delusional symptoms, a pathological degree of anxiety, and periods of talking in a rambling, disconnected fashion.

In his testimony the English-speaking psychiatrist said the patient was coherent and relevant, the patient pave coherent answers and showed calm behavior during his interrogation in the sanity hearing, and the judge, who had temporarily interrupted the proceedings, reached the conclusion a few days later that J.S. was "sane enough" to stand trial.

Case 2. R.A. was a 28-year-old Cuban patient charged with murder. During his rather lengthy hospitalization he was under the care of a Spanish-speaking physician who found him to be psychotic, suffering from terrifying imaginary experiences. Occasionally he was interviewed by an English-speaking psychiatrist, in whose judgment the patient was coherent, factual, and free from overt psychotic manifestations. I was asked to evaluate his mental status on a few different occasions and encountered exactly what the other Spanish-speaking physician had found.

